Office-Supreme Court, U.S.
FILED
FEB 28 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1448

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

STAUFFER CHEMICAL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REX E. LEE
Solicitor General

MARY L. WALKER
Acting Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

JOSHUA I. SCHWARTZ
Assistant to the Solicitor General

DIRK D. SNEL
JUDSON W. STARR
KATHLEEN P. DEWEY
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

Of Counsel:

ROBERT M. PERRY
General Counsel

CHRISTOPHER HERMAN
Attorney

Environmental Protection Agency
Washington, D.C. 20460

QUESTIONS PRESENTED

1. Whether the United States may be collaterally estopped from litigating a question of statutory interpretation of public importance governing the relationship between a federal agency and members of a large class of businesses subject to the agency's jurisdiction by the judgment of the court of appeals for a different circuit rendered in another case involving the same private party but arising from a separate transaction at a different location.

2. Whether a contractor retained by the Environmental Protection Agency specifically for the purpose qualifies as an "authorized representative" of EPA's Administrator entitled to participate in agency inspections of stationary emission sources pursuant to Section 114(a)(2) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7414(a)(2).

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STAUFFER CHEMICAL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-41a) is reported at 684 F.2d 1174. The court of appeals' order upon denial of a petition for rehearing (App. B, *infra*, 42a-43a) is unreported. The opinion of the district court (App. C, *infra*, 44a-56a) is reported at 511 F. Supp. 744.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, 57a-58a) was entered on July 7, 1982, and a timely petition for rehearing was denied (App. B, *infra*, 42a-43a) on October 15, 1982. On January 3, 1983, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including February 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 114(a) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7414(a) provides in pertinent part:

> (2) the Administrator or his authorized representative, upon presentation of his credentials—
>
> (A) shall have a right of entry to, upon, or through any premises of such person, or in which any records required to be maintained under paragraph (1) of this section are located, and
>
> (B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which such person is required to sample under paragraph (1).

STATEMENT

1. This case arises from respondent's challenge to use of a contractor duly designated as a representative of the United States Environmental Protection Agency to assist EPA employees in conducting an inspection of a stationary emission source under Section 114(a)(2) of the Clean Air Act, 42 U.S.C. (Supp IV) 7414(a)(2). EPA contracted with PEDCo Environmental, Inc. to assist with technical aspects of an overview inspection of an elemental phosphorus production plant operated by respondent located in Mt. Pleasant, Tennessee.[1] EPA

[1] The Clean Air Act, 42 U.S.C. (Supp. IV) 7401 *et seq.*, establishes a dual state-federal system of air pollution enforcement. EPA establishes national ambient air quality standards, 42 U.S.C. (Supp. IV) 7409, while the states are primarily responsible for enforcing these standards, subject to EPA's supervision and approval, 42 U.S.C. (Supp. IV) 7407, 7410 and 7412. As part of that oversight EPA employs its Section 114(a)(2) inspection authority to conduct an "overview inspection program" under which it inspects approximately 10% of the major stationary sources of air pollution within each state annually. The sources so inspected already have been inspected by state authorities, which submit reports to the EPA. The results of each overview inspection are compared with the previously-reported results of the state inspection of the same facility. The purpose of the overview inspections is to evaluate each state's performance in enforcing the Clean Air Act.

took steps necessary to ensure that information learned by employees of its inspection contractors during inspections was kept confidential. Thus, the terms of EPA's contract with PEDCo hold PEDCo and its employees to strict confidentiality (App. B, *infra*, 53a-54a). PEDCo, in turn, contracts with its employees that any violation of their confidentiality duties "will result in immediate dismissal and liability for any damages arising therefrom" (*id.* at 53a-54a n.5). Moreover, under EPA regulations, private contractors retained by the agency agree that regulated businesses that have an interest in confidential information disclosed to contractor personnel are intended beneficiaries of any applicable confidentiality agreement and may enforce such agreements against any breaching employee. 40 C.F.R. 2.301(h)(2)(ii).

EPA officials attempted to inspect respondent's Mt. Pleasant plant in March of 1980. When EPA personnel, accompanied by representatives of the Tennessee Division of Air Pollution Control, and assisting personnel from PEDCo arrived at the plant, respondent denied entry to the PEDCo employee. In ensuing negotiations, respondent attempted to condition admission of PEDCo personnel upon adherence to terms respondent had fixed. In addition to confidentiality requirements and provisions for liability in damages in the event of any breach, the agreement proposed by respondent would have afforded it absolute authority to determine the areas of the plant to be inspected, and required the contractor (and thus EPA) to give it two weeks' advance notice of any inspection (App. A, *infra*, 6a). EPA deemed these provisions unacceptable. Thereafter, on August 7, 1980, EPA secured an administrative warrant from a federal magistrate authorizing inspection of respondent's Mt. Pleasant, Tennessee facility. The warrant covered inspections by EPA employees and "accompanying, authorized representatives under contract to EPA." EPA and state officials, again accompanied by a PEDCo employee, again attempted to inspect respondent's Mt. Pleasant phosphorus plant pursuant to the warrant. Respondent again refused to

permit the PEDCo employee to participate in the inspection of the plant unless its terms for admission were accepted.

2. The following day, August 8, 1980, EPA sought to have respondent held in civil contempt by the United States District Court for the Middle District of Tennessee for its refusal to honor the warrant. Respondent countered with a motion to quash the warrant. Respondent argued that Section 114(a)(2) of the Clean Air Act, which empowers the EPA Administrator "or his authorized representative" to enter upon the premises of stationary pollution sources to sample emissions, does not sanction entry by contractors retained by EPA to assist in such inspections.[2] The opposed applications were consolidated for hearing. On April 17, 1981, the district court denied the motion to quash, holding that the inspection authority granted to "authorized representative[s]" of the EPA Administrator by Section 114(a)(2) extends to properly designated private contractors (App. C, *infra*, 44a-55a).[3] However, because respondent's noncompliance with the warrant was based upon its good faith "belie[f] that private contractors were not authorized representa-

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[2] Although the statutory question had, by the date of the hearing on its motion to quash, been decided in its favor in separate litigation involving a different plant, see *In re Stauffer Chemical Co.*, 14 Env't Rep. Cases 1737 (D. Wyo. 1980), respondent did not argue in district court that the Wyoming district court's decision was to be given preclusive effect. A second decision, contrary to the Wyoming district court's, had been rendered in a case to which respondent was not a party prior to submission of this case to the district court. See *Aluminum Co. of America* v. *EPA*, No. M-30-13 (M.D.N.D. Aug. 5, 1980). A third decision, likewise supporting EPA's position, was rendered in *Bunker Hill Co.* v. *EPA*, Civ. No. 80-2087 (D. Idaho Oct. 15, 1980), after submission but prior to entry of the district court's decision in this case.

[3] In the district court respondent also argued that EPA may not secure administrative warrants on an ex parte basis. The district court rejected this argument (App. C, *infra*, 55a-56a), and although respondent preserved the argument on appeal (see App. A, *infra*, 3a), the court of appeals did not reach that issue. No issue respecting the procedure for issuance of a warrant is presented here.

tives [under the Clean Air Act]," EPA's contempt motion was also denied, without prejudice to its renewal in the event respondent persisted in its refusal to honor the warrant (*id.* at 56a).

Although it observed that the question of statutory interpretation presented was a close one that had divided the district courts (App. C, *infra*, 46a-47a & n.2; see page 4 note 2, *supra*), after canvassing the pertinent statutory language, related statutory language and pertinent statutory legislative history, the district court was persuaded that the Administrator's authority to designate an "authorized representative" under Section 114(a)(2) is not confined to employees of EPA. First, the district court noted that Section 114(c) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7414(c) (which was enacted together with Section 114(a) as part of the 1970 Clean Air Act amendments), authorizes disclosure of confidential information obtained pursuant to a Section 114(a)(2) inspection to "other officers, employees or authorized representatives of the United States concerned with carrying out" the provisions of the act. Because the term "authorized representatives" in this closely related setting necessarily encompasses personnel other than officers and employees of the United States, such as authorized contractors, the district court concluded that the identical term employed in Section 114(a)(2) was to be accorded like scope (App. C, *infra*, 48a, 51a-52a).

Second, the district court noted that the House version of the Clean Air Act Amendments had limited entry and inspection authority to "officers or employees duly designated by the Secretary,"[4] whereas the Senate version, the one ultimately enacted, was broader, encompassing "the Secretary or his authorized representative." Because the plain meaning of the term "authorized representative" extends beyond agency officers and employees to all who are in fact the duly authorized agents of the Ad-

[4] At the time in question EPA had yet to be created, and the Secretary of Health, Education, and Welfare was charged with administration of the Clean Air Act.

ministrator, the district court concluded that agency contractors could participate in Section 114(a)(2) entries and inspections (App. C, *infra*, 50a-51a).

Third, the district court concluded that the usual practice of conducting searches with government personnel did not require a different reading of Section 114(a), because the Clean Air Act embodies a system of comprehensive monitoring of pollution emissions unknown at common law and with no counterpart in traditional police power enforcement schemes, because Congress had recognized the need for technical expertise possessed by contractors in implementation of the Clean Air Act, and because Section 114(c) of the Act makes clear that duly designated contractor-representatives can be provided access to information gained in Section 114(a)(2) inspections, even when such information is confidential (App. C, *infra*, 52a).[5]

The district court also concluded that respondent's concerns respecting confidentiality of proprietary information that might be disclosed to inspection agents did not require limitation of Section 114(a)(2) inspection authority to EPA personnel. Observing that Section 114(c) explicitly authorized disclosure of such confidential data to authorized EPA agents, the court concluded that Congress could not have regarded contractor access to such data to be incompatible with maintenance of confidentiality. Accordingly, the court treated the issue as one of the adequacy of the safeguards available to respondent in this particular case and concluded that the confidentiality provisions of EPA's contract with PEDCo and PEDCo's contract with its employees, together with EPA's regulations empowering respondent to enforce the confidentiality requirements of the foregoing agreements by appropriate legal and equitable remedies, were sufficient to dispel any legitimate concern respecting maintenance of confiden-

[5] Because it deemed the pertinent materials equivocal, the district court declined to adopt EPA's contention that Congress had ratified a consistent administrative practice respecting the application of Section 114(a)(2) (App. C, *infra*, 55a).

tiality, in the absence of any evidence that PEDCo was in competition with respondent in any business (App. C, *infra*, 53a-55a).

The district court also rejected respondent's contention that Section 114(a)(2), which governs inspections of stationary pollution sources (*i.e.* industrial plants), should be interpreted to conform with Sections 206(c) and 208(a) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7525(c) and 7542(a). The latter provisions govern inspections of motor vehicle plants, and describe the persons authorized to carry out such inspections as "officers and employees duly designated by the Administrator." The district court, concluded instead that the disparate provisions of Section 114(a)(2) and Sections 206(c) and 208(a) should be assigned their natural and distinct meanings, and that the difference "reflect[s] a measured congressional choice" (App. C, *infra*, 48a). The district court also considered legislative history of Section 308 of the Clean Water Act, 33 U.S.C. (& Supp. V) 1318, which was modeled upon Section 114 and enacted in 1972, two years after Section 114(a)(2), suggesting that inspection authority under the Clean Air Act was limited to EPA employees.[6] Although the language "g[a]ve the court pause," it ultimately concluded that such post-enactment legislative history was due relatively little weight in determining the intent of Congress in 1970 when Section 114(a)(2) was enacted. The court concluded that Congress' choice of the broad "authorized representative" language of the Senate bill, in place of the "officers or employees" language of the House bill, was a more telling indication of the pertinent congressional intent (App. C, *infra*, 48a-50a).

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[6] The Senate Report on the 1972 Amendments to the Clean Water Act, S. Rep. No. 92-414, 92d Cong., 1st Sess. 63 (1971), states:

> It should * * * be noted that the authority to enter, as under the Clean Air Act, is reserved to the Administrator and his authorized representatives which such representatives must be full time employees of [EPA]. The authority to enter is not extended to contractors with the EPA in pursuit of research and development.

3. On appeal, respondent argued for the first time that the decision in *In re Stauffer Chemical Co.*, 14 Env't Rep. Cases 1737 (D. Wyo. 1980), aff'd, 647 F.2d 1075 (10th Cir. 1981) ("*Stauffer I*"), collaterally estopped the United States from contending that the term "authorized representative" employed in Section 114(a)(2) includes a duly designated EPA contractor. *Stauffer I* presented the same legal question as this case, but arose from respondent's resistance to an administrative warrant authorizing inspection by EPA and its contractors of respondent's phosphate ore processing plant in Sage County, Wyoming. As previously indicated (see page 4 and note 2, *supra*), prior to the district court decision in the instant case the Wyoming district court had held in *Stauffer I* that Section 114(a)(2) does not permit EPA contractor personnel to assist in inspections, but respondent had not argued that that decision was to be afforded preclusive effect. *Subsequent* to the entry of the district court's decision in the instant case, the United States Court of Appeals for the Tenth Circuit affirmed the district court's judgment in *Stauffer I*, albeit cautioning that the issue was not "an open and shut matter" and acknowledging that under its decision the Clean Air Act is "not entirely internally consistent." 647 F.2d at 1079.

An unusually fragmented court of appeals reversed the decision of the district court in this case (App. A, *infra*, 1a-41a). While all members of the panel concurred in the judgment, the reasoning of each member was distinct, and each judge wrote separately. Judge Weick delivered what was characterized (*id.* at 1a) as the opinion of the court (*id.* at 1a-33a). Although he "agree[d] with Stauffer that the action is governed by estoppel and res judicata" and that it was therefore "unnecessary to reach other issues," Judge Weick went on to reach the merits "because they were briefed by both parties" (*id.* at 4a) concluding that Section 114(a)(2) does not permit EPA contractors to participate in inspections of stationary pollution sources. Judge Jones joined only in Judge Weick's discussion of collateral estoppel, stating that "the application of

the doctrine precludes this Court from addressing the merits of the issue presented" (*id.* at 34a). District Judge Siler (sitting by designation), on the other hand, concurred only in Judge Weick's opinion on the statutory issue, concluding that "the doctrines of collateral estoppel and res judicata should not be applied here" (*id.* at 39a). Thus, each branch of Judge Weick's opinion spoke for a majority of the court, and the judgment of the court of appeals rests upon alternative holdings.[7]

a. *Collateral Estoppel*—Because "the parties as well as the issues of fact and law in the present case and *Stauffer I* were identical" (App. A, *infra*, 11a), Judge Weick concluded that the doctrine of collateral estoppel described in *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979), was controlling (App. A, *infra*, 8a-13a). He concluded, moreover, that the "unmixed questions of law" exception to the rule of preclusion noted in *Montana* (440 U.S. at 162, quoting *United States* v. *Moser*, 266 U.S. 236, 242 (1924)), was inapposite, characterizing the issue presented on the merits as one governed by a "fact, question or right distinctly adjudged" in *Stauffer I*, rather than "a rule of law [enunciated] • • • in a subsequent action upon a different demand" (*United States* v. *Moser*, *supra*, 266 U.S. at 242) (App. A, *infra*, 12a-13a). Finally, Judge Weick condemned the government's effort to "relitigate[]" (*id.* at 12a) the issue decided in *Stauffer I*, stating (*ibid*; emphasis added) that the government's persistence

> brings up the question, how many times does the government have to lose a case before either the doctrines of collateral estoppel or res judicata are applied? If we were dealing with private parties rather than the government, there would be no question about it. *If EPA really believed the decision of the Tenth Circuit in Stauffer I was wrong, it could have petitioned the Supreme Court for certiorari,*

[7] Judge Weick's reasoning that, notwithstanding the application of collateral estoppel, the merits should be addressed was his alone.

> *but it did not avail itself of that remedy, and it is too late to do so now. EPA cannot collaterally attack the Tenth Circuit decision in the present case.*

By contrast, Judge Siler concluded that collateral estoppel had no application in this case (App. A, *infra*, 39a-41a). He stressed that the "federal appellate courts 'traditionally have permitted federal agencies to relitigate substantially identical *legal* issues raised by different transactions or events, after adverse decision elsewhere' " (*id.* at 40a, quoting *Western Oil & Gas Ass'n* v. *EPA*, 633 F.2d 803, 808 (9th Cir. 1980)). Judge Siler explained further that the issue preclusion rule was not to be applied so as to create an injustice. He concluded that such an injustice would result from application of collateral estoppel "if EPA were precluded from entering with private contractors at Stauffer's plant in Tennessee, but were using private contractors in entering competitor's plants in the same area" (App. A, *infra*, 40a-41a). Judge Siler concluded (*ibid.*), moreover, that

> where several different cases involving the same issues are being litigated simultaneously in separate circuits, collateral estoppel should not be invoked.

Judge Jones wrote separately on the collateral estoppel issue, explaining his concurrence in that branch of the court's opinion (App. A, *infra*, 34a-38a). Under *Montana* v. *United States*, *supra*, Judge Jones recognized (App. A, *infra*, 35a), collateral estoppel is not to be applied where "controlling facts or legal principles have changed significantly" since the judgment in a prior case, or where "other special circumstances warrant an exception to the normal rules of preclusion" (440 U.S. at 155). However, Judge Jones found these exceptions inapplicable (App. A, *infra*, 35a-36a). He discounted Judge Siler's concern that application of collateral estoppel would foster uneven application of the law to parties similarly situated, urging that application of different rules of law to respondent's facilities in different locations would create a more serious inequity. And even though he had

concluded that it was improper for the court to have reached the merits, given the applicability of collateral estoppel (*id.* at 34a), Judge Jones observed that because the other two members of the panel had reached the merits, the inequity that troubled Judge Siler was "illusory." He explained: "[T]he *stare decisis* impact of the Court's holding today, if it becomes final, may be expected to eliminate the practice [of contractor-assisted inspections] in this jurisdiction" [*id.* at 37a; citation omitted]. Finally, while Judge Jones agreed with Judge Siler that federal agencies ordinarily should be able to litigate controlling legal issues in more than a single circuit, he thought that rule inapplicable where the adverse party in the prior case is the same as the present one, and "the same defendant is sued *in seriatim* without the agency attempting to exhaust its appeals on the previous judgment." (*id.* at 37a, 38a).

b. *Interpretation of Section 114(a)(2)*—Writing for himself and Judge Siler, Judge Weick turned to the underlying question of statutory interpretation (App. A, *infra*, 13a-33a). At the outset, Judge Weick acknowledged the proper interpretation of the statute was not free from doubt, and that under his interpretation internal inconsistencies in the Clean Air Act remained (*id.* at 16a-17a).[8] He also recognized (App. A, *infra*, 15a-16a) that the decision of the Tenth Circuit in *Stauffer I* was at odds with the subsequent decision of the Ninth Circuit on the same issue rendered in a case not involving respondent, *Bunker Hill Co.* v. *EPA*, 658 F.2d 1280 (1981) ("*Bunker Hill*"). Nevertheless, after canvassing the pertinent statutory language and legislative history, Judge Weick concluded that Section 114(a)(2) of the Clean Air Act does not countenance assistance by contractors designated as EPA representatives in carrying out the inspections of stationary pollution sources authorized.

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[8] Judge Siler similarly acknowledged that the district court's contrary decision was not clearly incorrect (App. A, *infra*, 41a).

The court of appeals initially rejected EPA's contention that the plain meaning of the term "authorized representative" extended to contractor-representatives designated by EPA (App. A, *infra*, 17a). The court also concluded that no weight could be attributed to Congress' adoption in 1970 of the broad language "authorized representative" from the Senate bill, in preference to the terms "officers or employees" contained in the analogous provision of the House bill, because the respective legislative reports do not address the present question. Moreover, the court of appeals observed that the Conference Report made no mention of any distinction, and indeed, summarized the provisions of the alternative bills in nearly identical terms (i.e., authorizing entry and inspection by "DHEW investigative personnel" as opposed to "DHEW personnel"). The court therefore concluded that Congress intended that the term "authorized representative" serve as a synonym for "officers or employees" (App. A, *infra*, 17a-20a).

In addition, the court of appeals stated that Section 114(d) of the Act, 42 U.S.C. (Supp. IV) 7414(d), added by *1977* amendments, which requires "the Administrator (or his representatives)" to give notice to the appropriate state air pollution control agency before making an inspection under Section 114(a)(2), supports respondent's reading of the term representative in the latter Section. The court reasoned that Congress could not have entrusted "this kind of sensitive intergovernmental communication to employees of private contractors," and that the term "representatives" used in Section 114(a)(2) should be given a similarly narrow reading to conform to Section 114(d) (App. A, *infra*, 20a-21a). Moreover, the court of appeals rejected the conflicting observation of the district court (see page 5, *supra*) that Section 114(a) should be read in conformity with Section 114(c). Although the court of appeals did not dispute that the term "authorized representatives" as employed in Section 114(c) extends the right to disclosure of confidential

material to EPA contractors (App. A, *infra*, 21a), it thought to harmonize all three provisions as follows (*id.* at 22a):

> [T]he word "representative" as used in section 114 of the Clean Air Act means EPA officers or employees, unless the latter are already enumerated, as they are in Section 114(c). In that event, the plain meaning of "representative," i.e., one standing or acting for another through delegated authority, controls.

The Court recognized that the result of its interpretation was to assign two different meanings to the term "representative" as used in Section 114, but it thought this result unavoidable (*ibid.*). Moreover, the court reasoned that because the term "representative" employed in Section 114(c) necessarily denotes persons other than EPA employees, a homologous interpretation of Section 114(a)(2) would mean that the administrator could make inspections of stationary pollution sources *only* through persons other than agency employees (*ibid.*).

EPA also argued that because Section 301(a) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7601(a), authorizes the Administrator to delegate any of her duties (save only the promulgation of regulations) to "any officer or employee of the [EPA]," the term "authorized representative" employed in Section 114(a)(2) is superfluous unless it extends to persons other than EPA personnel such as contractors. Labeling this contention "ingenious" (App. A, *infra*, 23a) the court of appeals nonetheless concluded that "a more natural reading [of Section 114(a)(2)] is that 'authorized representative' contemplates the delegation authorized by Section 301(a)" (*ibid.*).

The court found its task to be "complicated" by the disparate language employed in the statutory provisions authorizing inspection of motor vehicle engines at the manufacturers' plants (App. A, *infra*, 23a; see page 7, *supra*). The court recognized that the use of broader language in Section 114(a) could "just as logical[ly]"

(App. A, *infra*, 24a, 30a) be taken to indicate congressional approval of the participation of agency contractors in statutory inspections. But because there is no mention in the legislative history of an intent to differentiate between authority to inspect stationary sources and authority to inspect motor vehicle engines, and because, in the court's view, "[i]t would be illogical and inconsistent" to interpret Section 114(a)(2) so as to vest EPA with broader authority as to stationary sources, a narrow reading of Section 114(a)(2) was adopted (App. A, *infra*, 25a).

Moreover, unlike the district court (see page 7, *supra*) and the Ninth Circuit (see *Bunker Hill*, *supra*, 658 F.2d at 1284), the court of appeals attached substantial weight to post-enactment legislative history respecting the 1972 Amendments to the Clean Water Act (App. A, *infra*, 26a-29a). The court reasoned that the timing and authorship of the Senate report on Section 308 of the Water Act lent substantial authority to the views expressed respecting previously enacted provisions of the Clean Air Act (App. A, *infra*, 28a). In any event, the court thought it "anomalous" (*id.* at 29a) that contractor-assisted inspections be permitted under the Clean Air Act, but not under counterpart provisions of the Clean Water Act (*ibid.*).[9]

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[9] The court of appeals also suggested that the legislative history of a 1980 amendment to analogous inspection provisions of the Solid Waste Act adding "representative[s]" duly designated by the EPA Administrator to the list of persons authorized to make inspections makes clear the intent to extend authority to persons other than EPA employees, and that the absence of comparable language in the legislative history of the 1970 Clean Air Act Amendments accordingly reflects a contrary intention (App. A, *infra*, 29a-30a).

In addition, the court of appeals rejected EPA's contention (previously accepted by the Ninth Circuit, *Bunker Hill*, *supra*, 658 F.2d at 1284 n.2) that Congress had ratified the agency's interpretation of Section 114(a)(2), by its failure to correct it in amending the Act in 1977. The court found the evidence respecting ratification inconclusive (App. A, *infra*, 31a). The court also found insufficient EPA's contention that Congress had ratified the agency's position

REASONS FOR GRANTING THE PETITION

The twin holdings of the court of appeals both present issues of general and practical importance that warrant further review. The collateral estoppel branch of the court of appeals decision presents an important question respecting the preclusive effect of decisions of lower federal courts upon legal questions of public importance that affect relations between a government agency and a broad class of similarly situated persons. The court of appeals' suggestion that the United States was bound to seek review in this Court of the Tenth Circuit's decision in *Stauffer I* or else be bound thereby is obviously irreconcilable with this Court's certiorari practice, and would moreover require a radical alteration of the practices of the Solicitor General. If allowed to stand, the decision betokens a substantial shift of workload from the courts of appeals to this Court. Moreover, the court of appeals' decision takes no account of the special considerations applicable to government litigation on questions of public law of widespread applicability that have been generally thought to preclude applications of collateral estoppel against the government in such settings. See, *e.g.*, *American Medical International, Inc.* v. *Secretary of Health, Education, and Welfare*, 677 F.2d 118, 121-124 (D.C. Cir. 1981); *Olegario* v. *United States*, 629 F.2d 204, 215 (2d Cir. 1980), cert. denied, 450 U.S. 980 (1981).

Even if the rule announced were confined to instances in which the party adverse to the government is the same as in the prior case in which an issue was litigated, the decision of the court of appeals would substantially affect the government's litigating practices and impose substantial burdens upon this Court, for it is frequently impossible to know in advance whether the issue decided against the government in a given case will reoccur in litigation with the same party. In any event, as to questions of public law, the decision of the court of appeals

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by approving appropriations for contractor assistance (*id.* at 32a-33a).

fosters an unacceptable disparity in the application of the laws to similarly situated persons. Insofar as the decision of the court of appeals turns upon the identity of the parties in this case and *Stauffer I* it is contrary to the D.C. Circuit's decision in *American Medical International, Inc.* v. *Secretary of Health, Education, and Welfare*, *supra*, 677 F.2d at 124.

The court of appeals' holding respecting Section 114(a) of the Clean Air Act also merits review. As the court of appeals acknowledged its decision creates a clear conflict with the Ninth Circuit decision in *Bunker Hill Co.* v. *EPA*, 658 F.2d 1280 (1981). That decision in turn deliberately rejected the Tenth Circuit's reasoning in *Stauffer I*. Because the court of appeals' decision eliminates an important tool employed by the EPA to assure enforcement of the nation's clean air laws, this sharply-drawn conflict merits resolution at this time.

1. Contrary to the view of the court of appeals, *Montana* v. *United States*, 440 U.S. 147 (1979), is not controlling here. As the Court indicated there, 440 U.S. at 155, collateral estoppel is inapplicable whenever "special circumstances warrant an exception to the normal rules of preclusion." We submit that the unique attributes and role of the United States as a litigant involve special circumstances that strongly militate against the application of the preclusion doctrine to government at least when it is engaged in the uniquely sovereign function of enforcing the public law, which governs the legal relations of federal agencies with broad classes of similarly situated persons or businesses.[10] These considerations have been fully outlined in our petition for a writ of certiorari and reply brief in *United States* v. *Mendoza*, cert. granted, No. 82-849 (Jan. 24, 1983), copies of which

[10] Although the United States was a party to *Montana*, no contention was made in that case that the applicability of collateral estoppel was in any respect affected by the government's special attributes and responsibilities. Moreover, as explained below (pages 23-24), these considerations had little if any application in *Montana* itself.

have been provided to respondent. We summarize them here.

First, unlike cases involving only private litigants, application of the issue preclusion doctrines in cases involving the United States must take account of the unique public interest in the uniform and rigorous enforcement of laws of general importance and applicability. See *Standefer* v. *United States*, 447 U.S. 10, 24-25 (1980); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973). Here, as in *Standefer*, this public interest outweighs the considerations that ordinarily underlie the preclusion doctrine.

Second, critical practical and legal realities that are present wherever the United States is engaged in litigation on recurring questions of law of widespread applicability argue strongly against the estoppel invoked by the court of appeals. The government is involved in far more litigation than any other party. Many legal issues of substantial public importance arise only in government litigation, moreover. See *American Medical International, Inc.* v. *Secretary of Health, Education, and Welfare*, *supra*, 677 F.2d at 121 n.24. (The underlying question of statutory interpretation in this case is typical in this respect.) Thus application of collateral estoppel to bar redetermination of such a legal question by a court of rank coordinate to one that has rendered a decision adverse to the government would substantially interfere with the operation of the prevailing system of development of the public law. In that system courts of coordinate rank are not bound by each other's decisions but apply instead the more flexible doctrine of stare decisis. Conflicts are resolved through the hierarchical process of appeal, en banc review and certiorari. As the courts of appeals and respected commentators have generally recognized, these considerations ordinarily preclude application of collateral estoppel to the government on recurring legal issues. *American Medical International, Inc.* v. *Secretary of Health, Education, and Welfare*, *supra*, 677 F.2d at 121-124; *Western Oil & Gas Ass'n* v. *EPA*,

633 F.2d 803, 808 (9th Cir. 1980); *Divine* v. *Commissioner*, 500 F.2d 1041 (2d Cir. 1974); *Restatement (Second) of Judgments* § 29, comment i (1980).

Third, invocation of collateral estoppel against the government on recurring legal issues is inappropriate because, through the Office of the Solicitor General, the government, unlike any other litigant, employs a formal mechanism for determining whether to take an appeal from or seek certiorari review of an adverse judgment. This process is relatively selective, particularly at the certiorari stage. Moreover, to a degree unmatched by any private party the government takes into account factors other than its narrow interest in prevailing in a particular lawsuit in making this selection. Thus the Solicitor General frequently decides against appeal or certiorari even though the legal conclusions of the deciding court are believed to be erroneous. Such determinations rest upon a host of other factors including a substantial measure of prosecutorial discretion, equitable and policy considerations, the perceived practical importance of the decision, limitations upon the resources of the government, and sensitivity to crowded dockets of the courts. Because of the substantial volume of government litigation, and the substantial share of this Court's limited docket already occupied by government cases, self-restraint is particularly necessary in connection with filing of petitions for a writ of certiorari.

This case well illustrates these considerations. No petition was filed in *Stauffer I*. But at the time the case was decided there was no conflicting decision of any court of appeals. Moreover, the pendency in the Ninth Circuit of *Bunker Hill*, an appeal from a district court decision favorable to the government, as well as the pendency of respondent's appeal to the Sixth Circuit from the district court's decision in this case, necessarily counseled against application to this Court for further review in *Stauffer I*. Any other course would have ignored this Court's announced certiorari practices, see Sup. Ct. R. 17.1(a), and would have disserved both the Court and

those litigants who compete for a place on its crowded docket.

Adoption of the novel rule endorsed by Judge Weick (see pages 9-10, *supra*) would compel the United States to reconsider this practice of selective pursuit of appeals and certiorari even though it benefits the public interest and facilitates sound judicial management. Instead, the government would be obliged to consider an inflexible policy of appealing (and even seeking certiorari on) the first adverse decision rendered on a legal issue. As a result, the courts of appeals and this Court would be burdened prematurely and unnecessarily, and judicial economy—the touchstone of the preclusion doctrine—would be disserved. Moreover, because of the limited docket of this Court, and the proliferation of statutes and litigation in recent years, constructions of the law that this Court might ultimately determine to be erroneous would more often be given finality. See, *e.g.*, *United States* v. *Foster Lumber Co.*, 429 U.S. 32 (1976) (rejecting the view of three courts of appeals); *NLRB* v. *Enterprise Association of Pipefitters*, 429 U.S. 507 (1977) (rejecting the view of five courts of appeals). Plainly, there is no interest served by invocation of collateral estoppel in the circumstances of this case that would justify these detrimental consequences.

2. The court of appeals evidently concluded that these foregoing principles had no application in the setting of this case because respondent was the party adverse to the government in *Stauffer I* as well as in the present case (App. A, *infra*, 11a, 12a-13a (opinion of Weick, J.); *id.* at 37a-38a (opinion of Jones, J.)). And in Judge Weick's view, this case was directly controlled by the holding of *Montana* v. *United States*, *supra*. We disagree on both accounts.

a. We recognize the force that ordinarily attaches to the distinction between relitigation of issues between parties that have previously litigated them; and relitigation when there is no such identity of parties. In the former situation, a party ordinarily can not claim surprise when

it finds itself bound by a judgment rendered against it, even on a question of law, if neither the factual or legal setting is unchanged. *American Medical International, Inc.* v. *Secretary of Health, Education, and Welfare, supra*, 677 F.2d at 121 n.24, 124 & n.46. But where, as here, the issue is a recurring one of public law applicable to a significant class of similarly situated persons, application of collateral estoppel to preclude independent determination of the issues by courts that subsequently consider the issue would—as Judge Siler recognized (App. A, *infra*, 40a-41a)—improperly afford the party that happened to be involved in the prior case decided against the government a favored position in the administration of the law. *American Medical International, Inc.* v. *Secretary of Health, Education, and Welfare, supra*, 677 F.2d at 124. As the American Law Institute has recognized (*Restatement (Second) of Judgments, supra*, at § 28):

> [R]elitigation of [an] issue [previously determined] in a subsequent action between the parties is not precluded [when]:
>
> * * * * *
>
> (2) The issue is one of law and * * * a new determination is warranted in order to * * * avoid inequitable administration of the laws * * *.

Contrary to Judge Jones' suggestion (App. A, *infra*, 36a), it is no answer to observe that refusal to apply collateral estoppel will entail a different kind of disparity in the application of the laws—one that depends upon geography. First, refusal to reach the merits need not have that effect, for the doctrine of stare decisis and the persuasive force of the decision of courts of coordinate or inferior rank will in the long run, at least, minimize such "inequities." More importantly, perhaps, the kind of unevenness of result permitted by redetermination of recurring questions of public law is essentially inoffensive. It is a natural result of the operation of a system of lower courts with limited geographical jurisdiction, and a Supreme Court with control over its limited docket.

On the other hand, application of different rules of law to persons similarly situated is in tension with fundamental values of equal justice. Compromise of those values is ordinarily warranted by the competing desiderata of judicial economy, protection of parties against multiple lawsuits, and the role preclusion ordinarily plays in minimizing inconsistent judgments. See *Montana* v. *United States*, *supra*, 440 U.S. at 153-154. But none of these values is advanced by application of collateral estoppel in a setting such as the present one. First, because the issue is one of law and its determination entails no trial-type proceedings, little if any economy is achieved by invocation of collateral estoppel. See page 23, *infra*. And whatever savings may properly be gained when relitigation is not justifiable, are fully achievable under the more flexible doctrine of stare decisis and through due regard for the decisions of coordinate courts. Second, when a recurring question of public law applicable to numerous parties is presented, reliance upon preclusion to govern cases arising between the parties to the original litigation, would on balance foster inconsistent judgments rather than reduce their incidence. And where, as here, the decision afforded preclusive effect is itself inconsistent with the decision of another court of coordinate rank, invocation of collateral estoppel plainly cannot eliminate inconsistent judgments. See *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 330 & n.14 (1979). The burden of multiple lawsuits, moreover, is a significantly less weighty consideration where, as here, multiple litigation arises from a federal agency's application of a uniform interpretation of a statute applicable to a host of similarly situated parties. By engaging in a regulated business within the various judicial circuits, each of which is ordinarily free (subject only to this Court's decisions) to interpret statutes for itself, respondent subjected itself to the possibility that it would become engaged in parallel litigation presenting a common legal question. See page 22 note 11, *infra*.

Contrary to Judge Jones' suggestion (App. A, *infra*, 38a), respondent's engagement in multiple litigation is not the result of some effort by EPA to "test its policy decisions in more than a single circuit, in circumstances where the same defendant is sued *in seriatim* without the agency attempting to exhaust its appeals on the previous judgment." Rather, this case, like *Stauffer I*, arises from *respondent's* applications to quash the warrants by EPA. Although those applications were triggered by EPA's actions, the agency's actions were not in any sense intended to embroil respondent in litigation. Rather EPA was simply performing its statutory duty to enforce the Clean Air Act through inspections. In seeking to avail itself of the assistance of contractor-representatives EPA merely applied a uniform interpretation of Section 114(a)(2) applicable to others similarly situated to respondent.[11] Thus, in the circumstances of this case the inequity that is produced by application of collateral estoppel is a special circumstance that warrants an exception to the normal rule of preclusion.[12]

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[11] We note that respondent operates plants in thirty states, spanning eleven of the twelve judicial circuits. See [1982] 2 Moody's Industrial Manual 5985. Eighteen of these plants are located within the Ninth Circuit. Query whether under the Sixth Circuit's decision EPA is obliged to follow *Stauffer I* with respect to these plants, notwithstanding the Ninth Circuit's contrary decision in *Bunker Hill*. If so, the resulting discrepancy in the administration of the laws is substantial indeed.

[12] The American Law Institute has rejected the analysis underlying Judge Jones' suggestion that failure to apply preclusion in a setting such as this works the greater inequity (*Restatement (Second) of Judgments, supra*, § 28, comment c):

> In deciding whether to apply issue preclusion * * * the choice is between two forms of disparity in resolution of legal controversy. * * * [T]he choice must be made in terms of the importance of stability in legal relationships between the immediate parties, the actual likelihood that there are similarly situated persons who are subject to application of the rule in question, and the consequences to the latter if they are subject to different legal treatment. *In this connection it can be particularly significant that one of the parties is a government agency responsible for continuing administration of a body of*

Nor does Judge Jones' alternative suggestion (App. A, *infra*, 37a) that the inequity produced by application of collateral estoppel is illusory here because a majority of the Court reached the merits, *support* the application of collateral estoppel. First, because a majority of the court of appeals relied upon collateral estoppel, there was no reason for the court to reach the merits. See *Montana* v. *United States*, *supra*, 440 U.S. at 152-153; *cf. Bowen* v. *United States*, 422 U.S. 916, 920 (1975). Conversely, because a separate majority reached the merits, invocation of collateral estoppel could have none of the salutary effects assigned for the doctrine generally. Neither the court, nor any of the parties was spared any labor associated with a decision on the merits. In short, the peculiar dual holding of the court of appeals amply demonstrates that application of collateral estoppel in this setting is likely to absorb, rather than to conserve, judicial resources.

The fact that the parties in this case and *Stauffer* [illegible] are identical cannot justify application of collateral estoppel for yet another reason. At the time when the Solicitor General decides whether to authorize an appeal, or whether to seek review in this Court of an adverse judgment, it is typically impossible to determine whether future litigation will arise in a case involving the same party or a different party. The Solicitor General's decision—particularly respecting whether to seek certiorari must turn instead upon the general importance of the issue, the existence of a conflict and the other criteria traditionally applied by this Court. If the United States is to be bound in future litigation with the adverse party, however, the mere possibility of future litigation with the same party powerfully militates in favor of further review in many cases that otherwise do not warrant that extraordinary step. Thus, even in its narrowest form, the

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law that affects members of the public generally, as in the case of tax law. Refusal of preclusion is ordinarily justified if the effect of applying preclusion is to give one person a favored position in current administration of a law.

decision of the court of appeals threatens a substantial distortion of existing litigation standards that would adversely affect the management of scarce judicial resources.

b. Contrary to Judge Weick's view, this case is not controlled by the holding of *Montana* v. *United States*, itself. As explained in our reply brief in *Mendoza* (at 9) the policy and practical considerations we outlined there and here had little application in *Montana*; for the issue presented there could arise in only two forums—the state courts in Montana and the United States District Court for Montana.[13] The issue, too, was not one involving a body of law applicable to a class of similarly situated persons, but one affecting the proprietary interest of the United States. The United States did not argue in *Montana*, as it does here, that the application of the preclusion doctrines was inappropriate in light of the government's special attributes and responsibilities, and the Court's opinion does not reflect any view respecting our present contentions. See also pages 26-27, *infra*.

c. Several other special considerations militate against application of collateral estoppel in the setting of this case. First is the existence of the conflicting decision of the Ninth Circuit in *Bunker Hill*. See *Parklane Hosiery Co.* v. *Shore*, *supra*, 439 U.S. at 330 & n.14. Of course, the decision of the Ninth Circuit was rendered after the district court's decision in this case, but that is equally true of the Tenth Circuit's decision in *Stauffer I*. Indeed, it is unclear what significance was attributed to the appellate affirmance in *Stauffer I*. Insofar as the court of appeals' collateral estoppel ruling rests upon the *Tenth Circuit's* decision in *Stauffer I*, an anomaly is

[13] This consideration is especially significant because in *Montana*, unlike this case, the government had engaged in conduct that may implicate the core concerns underlying the preclusion doctrines. It had litigated the issue to a conclusion in the Supreme Court of Montana, noted an appeal to this Court, then dismissed the appeal and pursued its parallel action in the federal court. The federal action, moreover, had been filed just after the action in state court was filed, and had been stayed upon the government's stipulation pending resolution of the state court litigation. 440 U.S. at 151.

created. The judgment of the district court was reversed even though the court committed no error on any matter presented to it. See 82-849 Reply Br. at 7. And insofar as the collateral estoppel ruling rests upon the decision of the Wyoming district court, undue weight was afforded to the decision of a district court in another circuit. See *Restatement (Second) of Judgments*, *supra*, at § 29, comment i. These anomalies are the inevitable result of resort to the rigid preclusion doctrine to govern a recurring question of public law affecting a class of similarly situated persons. By contrast, reliance upon the more flexible doctrine of stare decisis and due regard for the persuasive force of the decision of coordinate and inferior courts entails no such difficulties.

Reliance upon collateral estoppel with respect to legal issues is particularly inappropriate in the context of the difficult questions of statutory interpretation that arise under our complex environmental laws. See, *e.g.*, *E.I. DuPont DeNemours & Co.* v. *Train*, 430 U.S. 112, 135 & n.26 (1977); *Western Oil & Gas Ass'n* v. *EPA*, *supra*, 633 F.2d at 808. And this Court has frequently entered into such controversies only after a substantial accumulation of appellate jurisprudence. See, *e.g.*, *Union Electric Co.* v. *EPA*, 427 U.S. 246, 254-255 (1976); *Train* v. *NRDC*, 421 U.S. 60, 72-75 (1975).[14] This practice may be based in part upon the provisions of the major environmental statutes assigning jurisdiction to address certain claims upon a geographical basis, while others are treated as matters of national concern. See, *e.g.*, 33 U.S.C. 1369(b) (Clean Water Act); 42 U.S.C. (Supp. IV) 7607(b)(1) (Clean Air Act). But even where such explicit statutory provision is not made, questions of law under the environmental control statutes are capable of arising in every jurisdiction. Because of the substantial local interest in the manner in which these important

[14] The Court has also denied certiorari notwithstanding an acknowledged conflict among the circuits in appropriate circumstances. See, *e.g.*, *United States Steel Corp.* v. *EPA*, 605 F.2d 283 (7th Cir. 1979), cert. denied, 444 U.S. 1035 (1980).

issues are resolved, it appears particularly inappropriate to import the rigid issue preclusion doctrine into this area. Moreover, because of the prominent role in environmental litigation of large industrial corporations, national trade associations and national environmental advocacy groups, many of which do business or conduct litigation in manifold jurisdictions, any rule that assigns controlling weight to the identity of parties in determining the applicability of collateral estoppel in this setting provides an extra incentive for forum shopping, and also fosters indefensible inequities in the administration of the law to similarly situated parties.[15]

d. The decision of the court of appeals also fails to accord proper effect to the "unmixed questions of law" exception to the preclusion doctrine announced in *United States* v. *Moser*, *supra*, 266 U.S. at 242. See also *Montana* v. *United States*, *supra*, 440 U.S. at 162-163; cf. *Commissioner* v. *Sunnen*, 333 U.S. 591, 601 (1948) (separable facts rule). The court of appeals thought to avoid the application of this doctrine by characterizing the issue presented as one turning upon a "fact, question or right distinctly adjudged" in *Stauffer I*, rather than a "rule of law" enunciated in an action "upon a different demand"

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[15] By way of illustration, we note that United States Steel Corporation challenged the EPA's failure to comply with the notice and comment requirements of 5 U.S.C. 553 in promulgating final rules designating various areas as exceeding national ambient air quality standards for total suspended particulates in the Fifth Circuit, *United States Steel Corp.* v. *EPA*, 595 F.2d 207, modified, 598 F.2d 915 (1979), the Seventh Circuit, *United States Steel Corp.* v. *EPA*, 605 F.2d 283 (1979), cert. denied, 444 U.S. 1035 (1980), and in the Eighth Circuit, *United States Steel Corp.* v. *EPA*, 649 F.2d 572 (1981). Other companies challenged the EPA's procedure in the Third Circuit, *Sharon Steel Corp.* v. *EPA*, 597 F.2d 377 (1979), the Sixth Circuit, *Republic Steel Corp.* v. *Costle*, 621 F.2d 797 (1980), the Ninth Circuit, *Western Oil & Gas Ass'n* v. *EPA*, *supra*, and the District of Columbia Circuit, *New Jersey Department of Environmental Protection* v. *EPA*, 626 F.2d 1038. It would have been anomalous in the extreme for the result in any of those cases to have turned upon the presence or absence of a particular party—United States Steel.

(App. A, *infra*, 12a-13a; see *United States* v. *Moser*, *supra*, 266 U.S. at 242). But whatever gloss *Montana* v. *United States*, *supra*, may have placed upon the principles announced in *Moser* or *Sunnen*[16] we submit that no "fact, question, or right" decided in *Stauffer I* is controlling here and that this case does arise "upon a different demand" because the inspection in this case pertained to a different plant located in a different judicial circuit.[17] Because of the substantial public interest in allowing independent examination of recurring questions of public law by the various courts of appeals, this factor, unlike the factual differences deemed immaterial in *Montana*, 440 U.S. at 158-163, serves to render the rigid issue preclusion doctrine inapplicable.

3. a. Relatively little need be said respecting the court of appeals' decision on the merits of the question of statutory interpretation. As the court of appeals acknowledged, its decision conflicts directly with the Ninth Circuit's decision in *Bunker Hill Co.* v. *EPA*, 658 F.2d 1280 (1981). The latter decision in turn expressly disapproves the Tenth Circuit's decision in *Stauffer I*.

The court of appeals' decision eliminates an important tool employed by the EPA to assure enforcement of the Clean Air Act through its overview inspection program. If private contractors may not be designated to assist in conducting Section 114(a)(2) inspections, the agency's ability to operate an effective overview inspection program

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[16] Compare *American Medical International, Inc.* v. *Secretary of Health, Education, and Welfare*, *supra*, 677 F.2d at 119-121; *Hicks* v. *Quaker Oats Co.*, 662 F.2d 1158, 1166-1167 (5th Cir. 1981); *Union Carbide Corp.* v. *Commissioner*, 671 F.2d 67, 68 (2d Cir. 1982); *Starker* v. *United States*, 602 F.2d 1341, 1345-1347 (9th Cir. 1979) with *Western Oil & Gas Ass'n* v. *EPA*, *supra*, 633 F.2d at 808-809. Unlike the courts of appeals, this Court has never stated that *Montana* alters the rule of *Commissioner* v. *Sunnen*; in any event *Montana* itself treats *Moser* as good law. 440 U.S. at 162.

[17] The *Restatement (Second) of Judgments*, *supra*, § 28, comment c, suggests that application of the distinction drawn in *Moser* (266 U.S. at 242) depends upon whether preclusion would give one person "a favored position in the administration of current law." See page 22 note 12, *supra*.

may be compromised. For instance, 22 technically trained employees employed in EPA's Region IV (the administrative unit encompassing Tennessee) are responsible for monitoring compliance by approximately 4600 major stationary sources of air pollution located in an eight-state area. See Affidavit of James T. Wilburn (App. E, *infra*, 59a).[18] EPA has relied upon contractor-representatives both because its own enforcement resources are limited and because private contractors often possess considerable expertise and experience with certain industrial processes of inspection interest (*id.* at 60a). If EPA may not use the services of contractor-representatives, it will be obliged to hire employees who possess the requisite technical expertise. Because such expertise may be industry-specific, the hiring of numerous experts, each possessing a narrow technical specialty may be required, even though the services of such experts are not necessarily needed on a full-time basis. Accordingly, the decision of the court of appeals is likely to restrict EPA's ability to fulfill its statutory duties in the most efficient manner.

b. On the merits, our contentions are largely summarized in the decision of the district court below, and in the decision of the Ninth Circuit in *Bunker Hill*, upon which we rely. We note here only that the court of appeals' contrary reasoning is severely flawed.

First, there is no sufficient reason for disregarding what the court of appeals acknowledged (App. A, *infra*, 22a) to be the plain meaning of the term authorized "representative." That term, on its face, embraces all duly designated agents of the Administrator. Second, the court of appeals improperly attributed significance to the absence of comment in the legislative history of Section 114 (a)(2) upon the fact that the Senate version enacted into law was broader than its House counterpart. See *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 (1980). At the same time, the court of appeals gave undue weight

[18] This affidavit was submitted to the court of appeals in connection with the government's opposition to Stauffer's motion for a stay pending appeal, and is part of the record.

to language in the 1970 Conference report. Because the Report simply does not focus on the identity of persons authorized to make inspections, the casual descriptions of the Senate and House bills employed in the Conference Report reflect no view as to the question at issue. See *Bunker Hill*, *supra*, 658 F.2d at 1283-1284.

The court of appeals' effort to "harmonize" Section 114(a), (c) and (d) of the Act (App. A, *infra*, 20a-22a) falls of its own weight. Even if policy considerations suggest that intergovernmental notices required by Section 114(d) should be given by EPA personnel rather than contractor-representatives, it does not follow that Congress employed the term representative in that setting to exclude contractors. Rather, absent any actual indication of congressional intent, it is more reasonable to assume that Congress was content to rely upon EPA's prudence on this point. In any event, because the notices required by Section 114(d) do not require the technical expertise required for actual inspections, there is no reason to believe that Congress even considered the restriction interpolated by the Court.[19]

Finally, contrary to the court of appeals' conclusion, a comparison of the motor vehicle engine inspection provisions of the Act to Section 114(a)(2) suggests that the provisions are different in scope. And contrary to the court's suggestion there is nothing inherently irrational about such a distinction, or about a distinction between the inspection provisions of the Clean Water Act and Section 114(a)(2).

4. Although the first question we present is closely related to that under review in *United States* v. *Mendoza*, No. 82-849, it appears inappropriate simply to hold this case for disposition in light of *Mendoza*. First, this case will not necessarily be controlled by a decision in *Men-*

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[19] We note as well that, contrary to the court of appeals' suggestion (App. A, *infra*, 22a) an interpretation of the term representative employed in Section 114(c) that *includes* persons other than agency employees does not suggest that inspections under Section 114(a) may only be carried out by non-employees.

doza. Unlike this case, collateral estoppel was there applied against the United States even though the opposing party had not participated in the prior case. On the other hand, the Sixth Circuit, unlike the Ninth Circuit in *Mendoza* (see 82-849 Pet. App. 17a n.14) went so far as to hold that the United States was required to seek certiorari unless it planned to acquiesce in the adverse decision of a court of appeals. Finally, the underlying issue in *Mendoza* is one of constitutional law; preclusion in that setting is particularly troublesome because the adverse decision is not subject to legislative correction. Because this case presents an important and recurring variation upon the question to be addressed in *Mendoza*, plenary consideration of this case in tandem with *Mendoza* appears appropriate. In any event, because of the dual holding of the court of appeals, disposition in light of *Mendoza* is not possible here. Accordingly, we suggest this case merits plenary consideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

MARY L. WALKER
Acting Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

JOSHUA I. SCHWARTZ
Assistant to the Solicitor General

DIRK D. SNEL
JUDSON W. STARR
KATHLEEN P. DEWEY
Attorneys

Of Counsel:
ROBERT M. PERRY
General Counsel
CHRISTOPHER HERMAN
Attorney
Environmental Protection Agency

FEBRUARY 1988

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 81-5311

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

STAUFFER CHEMICAL COMPANY, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Middle District of Tennessee

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Decided and Filed July 7, 1982

Before WEICK,* Senior Circuit Judge, JONES, Circuit Judge and SILER,** U.S. District Judge.

WEICK, Senior Circuit Judge, delivered the opinion of the Court. JONES, Circuit Judge, (pp. 29-32) and SILER, District Judge, (pp. 33-35) delivered separate concurring opinions.

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* Judge Weick became a Senior Circuit Judge at the close of business on December 31, 1981.

** Honorable Eugene E. Siler, Jr., Judge, United States District Court for the Eastern and Western Districts of Kentucky, sitting by designation.

WEICK, Senior Circuit Judge. Stauffer has appealed to this court from an order of the district court denying its motion to quash an invalid administrative search warrant issued ex parte by a United States Magistrate, which authorized EPA to conduct an air pollution inspection of private commercial property belonging to Stauffer, namely, its plant located at Mt. Pleasant, Tennessee, said inspection to be made not only by authorized employees of EPA and the State of Tennessee, but also by unauthorized private contractors objected to by Stauffer to protect it from disclosure of its trade secrets or other proprietary information to competitors or others with a conflict of interest. Stauffer refused to permit the inspection to include the employees of private contractors unless such private contractors signed a nondisclosure agreement to protect Stauffer against disclosure by private contractors of Stauffer's trade secrets. The private contractors refused to execute the nondisclosure agreements prepared by Stauffer and Stauffer refused to permit the inspection of its property. EPA cited Stauffer with contempt of court for refusing the inspection. Stauffer then filed its motion to quash. The contempt citation and motion to quash were heard together by the district judge. He denied the motion to quash holding that the phrase "authorized representative" of the Administrator, as used in Section 114(a)(2) of the Clean Air Act, 42 U.S.C. § 7414(a)(2)[1] authorizes the EPA to use em-

[1] Section 114(a)(2) of the Clean Air Act, 42 U.S.C. § 7414(a)(2), reads as follows:

> (2) the Administrator *or his authorized representative*, upon presentation of his credentials—
>
> (A) shall have a right of entry to, upon, or through any premises of such person or in which any records required

ployees of private contractors in making such inspections and that Stauffer was required to comply with the warrant. He dismissed the contempt citation holding that "[b]ecause Stauffer legitimately believed that private contractors were not authorized representatives under the Clean Air Act, EPA's motion for contempt is denied. If Stauffer's subsequently refuses entry to its Mt. Pleasant plant to authorized representatives of the Administrator presenting proper credentials and a warrant, a contempt citation shall issue." This constituted a final appealable order.

The opinion of the district court in the present case is reported in *United States* v. *Stauffer Chemical Co.*, 511 F. Supp. 744 (M. D. Tenn. 1981).

Stauffer raises important questions on appeal. It argues that the EPA has no authority to obtain ex parte search warrants which would deprive Stauffer of the opportunity to contest the validity of the warrant and a search and seizure in pursuance thereof. Stauffer also contends that the phrase "authorized representative" of the EPA Administrator, used in section 114(a)(2) of the Clean Air Act, means full time employees of the EPA, not employees of private contractors. Further, Stauffer maintains that the EPA is collaterally estopped from bringing this action, because the parties have already litigated the question of who can act as an authorized representa-

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to be maintained under paragraph (1) of this section are located, and

(B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which such person is required to sample under pargraph (1).

(Emphasis added.)

tive of the EPA in a prior lawsuit in the federal courts in Wyoming, which decided the question in favor of Stauffer and against EPA. *Stauffer Chemical Co.* v. *EPA*, 14 E.R.C. 1729, *affirmed* 647 F.2d 1075 (10th Cir. 1981).

Because we agree with Stauffer that the present action is governed by collateral estoppel and res judicata, it is unnecessary to reach other issues, but we will treat all of the issues because they were briefed by both parties.

I

The Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, sets up a dual state-federal system of air pollution enforcement. Under the Act, the Administrator of the EPA is responsible for establishing national ambient air quality standards. 42 U.S.C. § 7409. The states are then primarily responsible for enforcing these standards, subject to supervision and approval by the EPA. *See* 42 U.S.C. §§ 7407, 7410, 7412. Pursuant to its mandate under the Clean Air Act, the EPA conducts an "Overview Inspection Program" in which it annually inspects approximately ten percent of the major stationary sources of air pollution in each state. Establishments which are selected for overview inspection have already been inspected by state air pollution authorities at some prior time, with the results of the state inspection being submitted to the EPA. The purpose of the overview inspections is to evaluate the state's performance in implementing the Clean Air Act by comparing the results of the overview inspection with the previously-reported results of the state's inspection.

The State of Tennessee is part of the Environmental Protection Agency's Region IV, which also

includes North Carolina, South Carolina, Kentucky, Alabama, Florida, and Georgia.

On October 17, 1979, Mr. John W. Hund, an environmental scientist employed by the EPA's Enforcement Division in Region IV, conducted an unannounced overview inspection of Stauffer Chemical Company's elemental phosphorus furnace plant in Mt. Pleasant, Tennessee. He was accompanied by two employees of the Tennessee Division of Air Pollution Control. A significant source of air pollution, the number three nodulizing kiln, was not in operation that day. As a result, the amount of pollutants being emitted was not representative of normal operating conditions, so Mr. Hund decided that a follow-up inspection would be necessary.

The follow-up inspection was set for March 27, 1980. On that day, Hund returned to the Mt. Pleasant Plant, along with an employee of the Tennessee Division of Air Pollution Control. He was also accompanied this time by Ronald Hawks and Gary Saunders, who were employees of a private company under contract with the EPA, PEDCo Environmental, Inc. ("PEDCo"). Hawks and Saunders were brought along on this visit because they had recently conducted an EPA overview inspection at Stauffer's elemental phosphorus furnace plant in Tarpon Springs, Florida, and thus were familiar with the processes and equipment involved.

The group arrived at the plant and explained the purpose of their visit. They were informed by the plant manager that Stauffer had no objection to an inspection being conducted by the EPA and Tennessee state employees, but that it was contrary to company policy to admit private individuals to company prem-

ises unless they first signed a suitable nondisclosure and hold harmless agreement.[2] The team then left the plant without conducting the inspection.

During the month of April, negotiations were carried on between Stauffer company headquarters in Connecticut, PEDCo and the EPA in an attempt to arrive at a mutually agreeable nondisclosure agreement. PEDCo employees under contract with the EPA had previously been admitted to Stauffer's Silver Bow, Montana plant after signing a nondisclosure agreement. Therefore, PEDCo forwarded to Stauffer a copy of the agreement which had been used at the Montana plant, together with some suggested modifications requested by the EPA. Stauffer sent back a counter proposal, incorporating many of the provisions suggested by the EPA, but also adding some new ones. Certain of Stauffer's proposals, including one giving Stauffer exclusive control over what areas of the plant were to be inspected and another one requiring the EPA to give Stauffer two weeks advance notice of any inspection, were deemed unacceptable by PEDCo and the EPA. Consequently, they rejected this proposed agreement on May 5, 1980.

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[2] The stated reason for this policy is to protect proprietary information as to trade secrets which outsiders might become privy to, and which might fall into the wrong hands and subject Stauffer to substantial damages for which it might have difficulty to recover complete reimbursement. For instance, Stauffer alleges that PEDCo also serves as a contractor for some of Stauffer's competitors.

The PEDCo employees in the instant case, Hawks and Saunders, had previously been admitted to Stauffer's plant in Tarpon Springs, Florida, by its plant manager, without being asked to sign any nondisclosure agreement. Stauffer maintains that this was unauthorized and was in violation of company policy and should not have been permitted.

Thereafter, the parties had no further contact until August.

On August 7, 1980, the EPA submitted an application and affidavits for a search warrant to inspect the Mt. Pleasant plant, which the magistrate granted ex parte. The warrant permitted

> duly authorized full-time employees [of EPA], and accompanying, authorized representatives under contract to EPA . . . to have entry upon [plant] premises during normal operating hours for the purpose of conducting an inspection, sampling, and monitoring pursuant to Section 114 of the Clean Air Act, 42 U.S.C. § 7414. . . .

There followed a long list of plant facilities and records which the inspectors were to have access to.

Armed with the warrant, an inspection team consisting of EPA's Hund, Ms. Carol Donohue of the Tennessee Division of Air Pollution Control, and Messrs. Hawks and Saunders of PEDCo went to Stauffer's Mt. Pleasant plant on August 7. They were also accompanied by the EPA attorney. Again there was an impasse. After conferring with company headquarters by telephone, plant officials informed the inspectors that the state and federal employees were free to conduct an inspection, but that the PEDCo employees would not be admitted without signing a nondisclosure agreement. Once again, the group left without conducting an inspection.

The next day, the EPA filed a petition in district court to hold Stauffer in contempt for its failure to honor the warrant. At the same time, Stauffer filed a motion to quash the warrant and for a temporary restraining order enjoining its enforcement. (The latter request was subsequently withdrawn by mutual

agreement.) A consolidated hearing on both motions was held in the District Court for the Middle District of Tennessee on August 29, 1980. The court issued its decision on April 17, 1981, holding that the term "authorized representative" in section 114(a)(2) of the Clean Air Act "may include private contractors." 511 F. Supp. at 746. Accordingly, the court refused to quash the warrant. However, it also declined to hold Stauffer in contempt, finding that Stauffer legitimately believed that private contractors were not authorized representatives for purposes of clean air inspections. Execution of the warrant has been stayed pending this appeal.

II

COLLATERAL ESTOPPEL

A threshold issue in the present appeal is Stauffer's contention that consideration of this case is governed by the doctrine of collateral estoppel because the same parties have litigated the identical issues previously resulting in a decision in favor of Stauffer's and against EPA by the federal district court in Wyoming and affirmed by the United States Court of Appeals for the Tenth Circuit.

As noted previously, the hearing in the federal district court in the present case was held on August 29, 1980. Shortly before that, on June 23, 1980, the federal district court in Wyoming issued an opinion holding that the phrase "authorized representative" in Section 114(a)(2) of the Clean Air Act, 42 U.S.C. § 7414(a)(2), does not include private contractors, particularly competitors with a conflict of interest or an axe to grind who may be interested in obtaining Stauffer's trade secrets. *In re Stauffer Chemical Company*, 14 E.R.C. 1737 (D. Wyo. 1980), called

"Stauffer I". (That decision was subsequently affirmed on appeal *sub. nom Stauffer Chemical Co.* v. *Environmental Protection Agency*, 647 F.2d 1075 (10th Cir. 1981)).

The facts in *Stauffer I* were identical to those in the instant case except they arose in a plant of Stauffer's at a different location. One morning in April 1980 a team of EPA inspectors arrived unannounced at Stauffer's Leefe Plant near Sage, Wyoming, in order to conduct a Clean Air Act oversight inspection. The team consisted of state and EPA employees, and two employees of a private contractor GCA Corporation. Stauffer was willing to admit the government employees but not the GCA personnel, unless they first signed a nondisclosure and hold harmless agreement. The EPA team did not agree to this condition and left without conducting the inspection. EPA then obtained an ex parte administrative search warrant from a U.S. Magistrate authorizing it to conduct an inspection of the Leefe Plant through the use of the two GCA employees. When the inspectors returned to the plant with the warrant, Stauffer still refused to admit the GCA employees unless they signed the agreement. This condition was again refused, and the team again departed without accomplishing its mission. Stauffer then filed an application for a temporary restraining order enjoining EPA and the two GCA employees from executing the warrant and a motion to quash the warrant, and the district court after an extensive hearing, permanently enjoined EPA from using GCA employees or employees of other companies under similar contract with EPA, in inspections of any Stauffer plant in Wyoming without the permission of Stauffer. Upon appeal by EPA the judgment of the district court was

affirmed. *Stauffer I*, 647 F.2d at 1076-77 (10th Cir. 1981).

Stauffer therefore contends that, because the parties and the issues in *Stauffer I* and the present case were identical, and the issues were resolved against EPA in the prior litigation, the government acting through its agency, EPA is collaterally estopped from relitigating in this action the issue of who can be an "authorized representative" under Section 114 of the Act.

In *Montana* v. *United States*, 440 U.S. 147 (1979), Justice Marshall, who wrote the opinion for an almost unanimous court with only one dissenting opinion stated:

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . . ." *Southern Pacific R. Co.* v. *United States*, 168 U.S. 1, 48-49 (1897). Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. *Cromwell* v. *County of Sac*, 94 U.S. 351, 352 (1877); *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326 (1955); 1B J. Moore, Federal Practice ¶ 0.405[1], pp. 621-624 (2d ed. 1974) (hereinafter 1B Moore); Restatement (Second) of Judgments § 47 (Trent. Draft No. 1, Mar. 28, 1973) (merger); *id.* § 48 (bar). Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is con-

> clusive in subsequent suits based on a different cause of action involving a party to the prior litigation. *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1970); Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1, 2-3 (1942); Restatement (Second) of Judgments § 68 (Tent. Draft No. 4, Apr. 15, 1977) (issue preclusion). Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. *Southern Pacific R. Co., supra*, at 49; *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294, 299 (1917). To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

As to res judicata, the Supreme Court, in an opinion delivered recently by Justice Rehnquist in *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981) stated:

> There is little to be added to the doctrine of res judicata as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-353 (1877).

Since the parties as well as the issues of fact and law in the present case and *Stauffer I* were identical,

there is no valid reason why they should be relitigated a second time in the present case. It brings up the question, how many times does the government have to lose a case before either the doctrines of collateral estoppel or res judicata are applied? If we were dealing with private parties rather than the government, there would be no question about it. If EPA really believed that the decision of the Tenth Circuit in *Stauffer I* was wrong, it could have petitioned the Supreme Court for certiorari, but it did not avail itself of that remedy, and it is too late to do so now. EPA cannot collaterally attack the Tenth Circuit decision in the present case.

The court in *Montana* also addressed the exception of "unmixed questions of law" quoting on page 162 from *United States* v. *Moser*, 266 U.S. 236, 242 (1924) as follows:

> "Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action *upon a different demand* are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law." *Ibid.* (emphasis added). P. 162.

It is noteworthy that "[a] fact, question, or right distinctly adjudged in the original action, cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law." Since the fact, question or right in the present case was dis-

tinctly adjudged in *Stauffer I* the exception in *Moser* is inapplicable here.

We therefore hold that the Environmental Protection Agency is barred from relitigating these issues with Stauffer.

III

A

The central issue in this case if not barred by collateral estoppel and res judicata is the meaning of the phrase "authorized representative" in section 114(a)(2) of the Clean Air Act.[3] 42 U.S.C. § 7414 (a)(2). That section provides:

> (a) the Administrator or his authorized representative, upon presentation of his credentials—
>
> (A) shall have a right of entry to, upon, or through any premises of such person or in which any records required to be maintained under paragraph (1) of this section are located, and
>
> (B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which such person is required to sample under paragraph (1).

To date, few courts have been called upon to consider this question. In addition to the lower court in the instant case, the Ninth and Tenth Circuits have recently examined this issue, reaching opposite conclusions. *See Bunker Hill Company Lead and Zinc Smelter* v. *United States Environmental Protection Agency*, 658

[3] Throughout this opinion, "the Act" will be used to refer to the Clean Air Act, and "section 114" will refer to section 114 of the Clean Air Act, 42 U.S.C. § 7414.

F.2d 1280 (9th Cir. 1981); *Stauffer Chemical Company* v. *Environmental Protection Agency*, 647 F.2d 1075 (10th Cir. 1981). These cases are discussed, *infra*.[4]

B

As noted earlier, the district court in the present case held that the phrase "authorized representative" in section 114(a)(2) of the Act may include private contractors. 511 F. Supp. at 746. The court founded its opinion on three main points: the plain meaning of the words used; a comparison with section 114(c) of the Act; and rejection of a statement in the legislative history of the Clean Water Act which refers to the Clean Air Act.

The court discussed the plain meaning of the words "authorized representative," which were used in the Senate bill, as opposed to the phrase "officers or employees," which was used in the House bill, and reasoned that the adoption of the Senate version evidenced a deliberate choice to give the EPA broader authority in making inspections because the plain meaning of "representative" is broader than "officers or employees." 511 F. Supp. at 747. The court applied similar reasoning to the difference between section 114(c) and the motor vehicle inspection provisions of the Act, found in sections 206(c) and 208(a), 42 U.S.C. §§ 7525(c) and 7542(a). Since the latter sections use the phrase "officer or employee," the court concluded that Congress must have made a deliberate choice to use a broader term in section 114(a). *Id.* at 746.

[4] The issue was also raised recently in the Fourth Circuit, but the case was remanded without reaching the merits. *Aluminum Co. of America* v. *United States Environmental Protection Agency*, 663 F.2d 499 (4th Cir. 1981).

The district court also placed great weight on the use of the phrase "officers, employees, or authorized representatives" in section 114(c) of the Act, 42 U.S.C. § 7414(c). That section allows the Administrator to disclose confidential information obtained in the course of section 114(a) inspections to "other officers, employees, or authorized representatives of the United States" who have a legitimate need for it. As used in section 114(c), "authorized representatives" clearly means someone other than employees, because otherwise it would be redundant. Therefore, reasoned the court, "authorized representative" must mean someone other than employees in section 114(a) as well. *Id.*

The third foundation of the district court's holding was its decision to reject as non-authoritative a statement in the legislative history of the Clean Water Act, which was enacted after the Clean Air Act, to the effect that the Clean Air Act does not permit contractors to be used as "authorized representatives." (This passage will be discussed further, *infra.*) The court admitted that this statement was troubling, but concluded that post enactment statements of legislative intent are an unreliable guide and should not be followed. *Id.* at 747.

In *Bunker Hill Co. Lead and Zinc Smelters* v. *United States Environmental Protection Agency*, 658 F.2d 1260 (9th Cir. 1981), the Ninth Circuit reached the same result as the district court in the case at bar. The *Bunker Hill* court reasoned that the plain meaning of "authorized representative" is broader than "officers or employees." 658 F.2d at 1283, and that the Clean Water Act legislative history was entitled to no weight because it came after the enactment of the Clean Air Act. *Id.* at 1281. The court also found that Congress had tacitly ratified EPA's

use of private contractors by approving appropriations for their use. *Id.*

The Tenth Circuit arrived at the opposite conclusion. In *Stauffer Chemical Co.* v. *Environmental Protection Agency*, 647 F.2d 1075 (10th Cir. 1981), which we have been referring to as *Stauffer I*, the court held that a private contractor cannot be an "authorized representative" of the Administrator under section 114(a)(2). The Tenth Circuit rejected the plain meaning approach, and relied instead upon the legislative history of section 114(a), which speaks of the Department of Health, Education and Welfare (DHEW) (now EPA), "personnel," and noted that employees of a contractor are not EPA personnel, but the contractor's personnel. 647 F.2d at 1078. The court also found the Clean Water Act legislative history persuasive. While noting that post-enactment statements should generally be accorded less weight than contemporaneous legislative history, the court concluded that the Clean Water Act legislative history should be considered because of the close subject matter relationship beween the two acts and the short time span between them. *Id.* at 1079. In addition, a holding that private contractors could be authorized representatives under Section 114(a) would create an unacceptable anomaly between the Clean Air and Clean Water Acts, i.e., EPA could use private contractors to conduct inspections under the Clean Air Act, but not under the Clean Water Act, even though the wording of the two statutes is virtually identical. *Id.*

IV

With these conflicting precedents in mind, we begin our analysis. At the outset, let us frankly admit that although consistency is a virtue in statutory in-

terpretation, various portions of the Clean Air Act are not consistent with each other, making it impossible to arrive at an entirely satisfying result. *See Citizens to Save Spencer County* v. *United States Environmental Protection Agency*, 600 F.2d 844, 870 (D.C. Cir. 1979). The statute itself does not define "representative." *See* 42 U.S.C. § 7602. As the court below noted, both parties in this case have submitted excellent briefs. Indeed, this case is an apt illustration of Chief Justice Marshall's comment that "[w]here the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived. . . ." *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). The lower court was also correct, though, in saying that there is little that could make the resolution of this problem easier. On balance, however, we believe the Tenth Circuit's position is the correct one.

The district court and the Ninth Circuit relied upon the plain meaning of the word "representative." However, the plain meaning of statutory language is not always decisive. *Lynch* v. *Overholser*, 369 U.S. 705, 710 (1962); *Missouri Pacific Railroad Co.* v. *Austin*, 292 F.2d 415 (5th Cir. 1961). This is especially true when the legislative history suggests a different interpretation. *Cleary* v. *Chalk*, 488 F.2d 1315 (D.C. Cir. 1973). The legislative history of an act must be examined in order to ascertain Congressional intent, even though the statutory language appears to be plain. *United States* v. *Kelly*, 328 F.2d 227 (6th Cir. 1964); *United States* v. *Hepp*, 497 F. Supp. 348 (N.D. Iowa 1980); *see Lewis* v. *United States*, 445 U.S. 55 (1980).

The Clean Air Act as originally enacted in 1955 was extensively revised and enlarged by the Clean

Air Act Amendments of 1970, P. L. 91-604. The final version of the Clean Air Act which emerged was an amalgam of the House and Senate bills, title I, relating to stationary air pollution sources, being derived from the Senate bill and title II, pertaining to motor vehicles, coming from the House bill. The house bill, H.R. 17255, consistently used the phrase "officers or employees" throughout. Thus section 112(f) of H.R. 17255 provided:

> For purposes of enforcement of this section, *officers or employees* duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner or person in charge, are authorized to enter, at reasonable times, any establishment which the Secretary has reason to believe is or may be in violation of regulations issued under this section to determine whether any such violation is occurring. . . .

H.R. 17255, 91st Cong., 2d Sess. § 112(f) (1970), *reprinted in A Legislative History of the Clean Air Amendments of 1970* (hereafter cited as "*Air Leg. Hist.*") at 923 (1974) (emphasis added).

The Senate bill, on the other hand, used the phrase "authorized representative." Section 116(a)(3) of S. 4358 provided in part:

> For the purpose of . . . making any investigation under this Act of any building, structure, monitoring equipment, or other facility subject to any air quality standard . . . the Secretary or his *authorized representative* shall have a right of entry to, upon or through such building, structure, or facility, upon presentation of his credentials.

S. 4358, 91st Cong., 2d Sess. § 116(a)(3) (1970), *reprinted in Air Leg. Hist.* at 570 (emphasis added).

The respective legislative histories of these two bills did not discuss the meaning of the phrases used, but merely repeated without discussion the terminology used in the bills. *Compare* H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. (1970), *reprinted in Air Leg. Hist.* at 901, *with* S. Rep. No. 91-1196, 91st Cong., 2d Sess. 58 (1970), *reprinted in Air Leg. Hist.* at 459. The conference report stated that the House bill "authorized entry into and inspection of suspected polluters' facilities by DHEW investigative personnel," while "the Senate authorized entry and inspection by DHEW personnel." [5] Conf. Rep. No. 91-1783, 91st Cong., 2d Sess. (1970), *reprinted in Air Leg. Hist.* at 197 and [1970] *U.S. Code Cong. & Ad. News*, 5374, 5379-80. The final version which was enacted and became section 114(a) followed the language of the Senate bill. *Id.*, *reprinted in Air Leg. Hist.* at 198 and [1970] *U.S. Code Cong. & Ad. News* at 5374, 5381.

Although the district court attributed great importance to the difference between the House's "officers or employees" and the Senate's "authorized representative," Congress itself did not. As we have seen, the conference report on the Clean Air Amendments states that the House bill authorized entry and

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[5] At the time the Clean Air Act was being considered, air pollution enforcement was the responsibility of the Department of Health, Education and Welfare (DHEW). Those duties were transferred to the Environmental Protection Agency when it was created. Consequently, "DHEW personnel" should now be read to mean "EPA personnel." *See* Conf. Rep. No. 91-1783, 91st Cong., 2d Sess. (1970), *reprinted in* [1970] *U.S. Code Cong. & Ad. News* 5374, 5374.

inspection by "DHEW investigative personnel" and the Senate bill authorized entry and inspection by "DHEW personnel." It is therefore apparent that Congress considered the two phrases to be equivalent. Although it is ordinarily presumed that a difference in language reflects a difference in meaning when the legislative history shows that no difference was in fact intended, that presumption is rebutted. *Moore* v. *Harris*, 623 F.2d 908 (4th Cir. 1980). As the Tenth Circuit noted, employees of private contractors are not the EPA's personnel, they are the contractor's personnel. *Stauffer I*, 647 F.2d at 1078. Moreover, the language of rejected alternative legislation is not entitled to great weight in construing legislation that was finally passed, since the court has no way of knowing what motivated the legislature to take such action. 73 Am. Jur. 2d *Statutes* § 171 (1974); *see Holt* v. *Middlebrook*, 214 F.2d 187 (4th Cir. 1954).

A statute should be read and construed as a whole and, if possible, given a harmonious, comprehensive meaning. *Weinberger* v. *Hynson, Wescott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973); *Federal Trade Commission* v. *Manager, Retail Credit Co., Miami Branch Office*, 515 F.2d 988 (D.C. Cir. 1975); *Ashcroft* v. *United States Department of Interior*, 513 F. Supp. 595 (D. Ariz. 1981). Construing authorized representatives under section 114(a)(2) to include private contractors would lead to inconsistencies between that section and other parts of the Clean Air Act. Section 114(d), added by the Clean Air Amendments of 1977, P.L. 95-95, requires "the Administrator (or his representatives)" to give notice to the applicable state pollution control agency before making an inspection under section 114(a)(2). The purpose of this notice is to foster cooperation and

consultation between the EPA and the states regarding enforcement matters. H.R. Conf. Rep. No. 95-564, 95th Cong., 1st Sess. 136 (1977), *reprinted in* [1977] *U.S. Code Cong. & Ad. News* 1502, 1516. Stauffer argues—correctly, we think—that Congress could not have intended to entrust this kind of sensitive intergovernmental communication to employees of private contractors. Rather, the word "representatives" as used in section 114(d) necessarily envisions EPA employees. In interpreting the meaning of one provision of an act it is proper that all other provisions in *pari materia* also be considered. *Saxon* v. *Georgia Association of Independent Insurance Agents, Inc.*, 399 F.2d 1010 (5th Cir. 1968). Since sections 114(a) and (d) both concern inspections, we conclude that the term "representative" should be given the same meaning in both sections.

The trial court focused instead on section 114(c), 42 U.S.C. § 7414(c), which concerns disclosure of information. That section allows the Administrator to disclose confidential information obtained during section 114(a) inspections to "other officers, employees, or authorized representatives of the United States" who may need it to carry out their duties. The court reasoned, logically enough, that in the context of section 114(c), "authorized representatives" obviously means someone other than officers or employees because otherwise it would be redundant: 511 F. Supp. at 746. We agree that that is the only reasonable conclusion with regard to section 114(c), but we disagree that the use of "representatives" in that section controls the use of that word in section 114(a).

We believe that the interpretation of the word "representative" in these various sections is simply a

matter of grammar. "Representative" in section 114 (c) must mean someone other than officers or employees because they have already been mentioned. However, officers and employees are not mentioned in sections 114(a) and (d). To apply the same meaning to "representative" in those sections would lead to the absurd result that only the Administrator and employees of private contractors could make pollution inspections, and EPA employees could not.

Therefore, the only logical conclusion is that the word "representative" as used in section 114 of the Clean Air Act means EPA officers or employees, unless the latter are already enumerated, as they are in section 114(c). In that event, the plain meaning of "representative," i.e., one standing or acting for another through delegated authority, controls. We realize that this leads to the undesirable result that the word "representative" has different meanings in different portions of the statute, but we suggest that this is one of the instances in which one is simply forced to conclude that there is a lack of congruence between one section of the statute and another. The same phrase used in different sections of a complex act does not necessarily carry the same meaning in each context. *In re Petition of Chin Thloot Har Wong*, 224 F. Supp. 155 (S.D.N.Y. 1963).

This construction of the phrase "authorized representative" in section 114(a)(2) is buttressed by section 301(a) of the Act, 42 U.S.C. § 7601(a). That section provides in part that the Administrator "may delegate to any *officer or employee* of the Environmental Protection Agency such of his powers and duties under this Act, except the making of regulations, as he may deem necessary or expedient." (Emphasis added.) The EPA argues that the word "Ad-

ministrator" in section 114(a)(2) should be construed to mean "officer or employee" on the assumption that the Administrator has already exercised his delegation authority under section 301(a), and therefore "authorized representative" means someone other than officers or employees. While this interpretation is ingenious, we think that a more natural reading is that "authorized representative" contemplates the delegation authorized by section 301(a) which, of course, is limited to officers or employees. Moreover, the word "Administrator" is defined in section 302(a), 42 U.S.C. § 7602(a), as "the Administrator of the Environmental Protection Agency." The statutory definition of that word is therefore limited to the named official, and does not include officers or employees.

Our task is complicated by the fact that the Clean Air Act has comparable, but separate, provisions for inspection of motor vehicle engines at the manufacturers' plants, and these provisions are worded differently. Section 206(c) of the Act, 42 U.S.C. § 7525(c), permits "officers or employees duly designated by the Administrator" to enter the plants of motor vehicle manufacturers for the purpose of testing motor vehicles or engines. Section 208(a), 42 U.S.C. § 7542(a), requires motor vehicle manufacturers to maintain records and provides in part:

> Every manufacturer . . . shall, upon request of an officer or employee duly designated by the Administrator, permit such officer or employee at reasonable times, to have access to and copy such records.[6]

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[6] Section 208(b), 42 U.S.C. § 7542(b), is comparable to section 114(c), 42 U.S.C. § 7414(c), regarding confidentiality of records, and permits the Administrator to disclose confi-

At the time the 1970 Clean Air Amendments were enacted, there was an existing section 207(a) of the Act, former 42 U.S.C. § 1857f-6, comparable to the present section 208(a), 42 U.S.C. § 7542(a), which used the phrase "officer or employee." The 1970 House bill, H.R. 17255, from which the present title II of the Act was derived, retained the language of the former statute in using the words "officer or employee."

As we have seen, Congress chose the Senate version using "authorized representative" in enacting section 114. The EPA argues, and the district court agreed, that the choice of "authorized representative" in section 114(a) as opposed to "officer or employee" in former section 207(a) shows a deliberate decision on the part of Congress to give the EPA broader inspection authority with regard to stationary sources (section 114) than for motor vehicles (sections 206 and 208). However, it is just as logical—and, we think, preferable—to hold that these sections should be construed so that they harmonize with each other, i.e., so that the inspection and entry power for both stationary sources and motor vehicles is limited to EPA officers and employees.

Different portions of the same statute should be read and interpreted consistently with each other, avoiding conflicts. *Citizens to Save Spencer County* v. *United States Environmental Protection Agency*, *supra*, 600 F.2d at 870; *United States* v. *Toledo*,

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dential information to "other officers, employees, or authorized representatives of the United States" when necessary for any proceeding under the Act. The purpose of these provisions is to protect government personnel from liability under the Trade Secrets Act, 18 U.S.C. § 1905, which they would otherwise incur by disclosing such information.

Peoria & Western Railroad Co., 280 F. Supp. 243 (N.D. Ind. 1968); *American Cyanamid Co.* v. *Ladd*, 225 F. Supp. 709 (D.D.C. 1964). In determining the meaning of a statute, a court must consider the consequences that would result from construing it one way or the other *Sheftic* v. *Boles*, 295 F. Supp. 1347 (N.D.W.Va. 1969). It would be illogical and inconsistent to hold that the EPA may use private contractors to conduct inspections under the stationary source portion of the Clean Air Act but not under the motor vehicle portion of the same Act.

Moreover, the legislative history does not reflect any conscious choice on the part of Congress to give the EPA broader authority under section 114 than it has under section 206. The conference report discusses each section of the final bill, but does not mention the difference in phraseology between section 114 and sections 206 and 208. *Compare* the discussion of section 114 in Conf. Rep. No. 91-1783, 91st Cong., 2d Sess. (1970), *reprinted in* [1970] *U.S. Code Cong. & Ad. News* 5374, 5379-81 *with* the discussion of section 206, *id.* at 5382-84.[7] Ordinarily, the use of dif-

[7] The conference report states: "The provisions of the House bill and the Senate amendment revising the procedures under existing law for prototype testing and authorizing production line testing of new motor vehicles and engines were essentially the same . . . ." Conf. Rep. No. 91-1783, 91st Cong., 2d Sess. (1970), *reprinted in Air Leg. Hist.* at 201 and [1970] *U.S. Code Cong. & Ad. News* 5374, 5382. Stauffer argues that this demonstrates, as in the case of section 114, that Congress equated "authorized representatives" with "officers or employees." The EPA contends that the above statement refers only to the provisions for prototype and production line testing, not entry. We believe it is unclear whether this statement was meant to include the entry provisions of the two bills or only the testing procedures, and we therefore give it no weight one way or the other.

ferent language creates an inference that Congress meant different things. However, when the statutory purposes and legislative history establish that no difference was in fact intended, the inference is negated. *Moore* v. *Harris*, *supra*. Since section 114 was taken from the Senate bill and sections 206 and 208 from the House bill, rather than showing a conscious choice on the part of Congress, it seems more likely that the final product was a result of the two bills being tacked together without any thought being given to this small difference in their wording. Allowance must sometimes be made for human error and inadvertence in drafting legislation. *Citizens to Save Spencer County* v. *United States Environmental Protection Agency*, *supra*, 600 F.2d at 871-72.

Another factor which strongly militates in favor of the interpretation which we adopt here is Congress's amendment of the Federal Water Pollution Control Act ("Clean Water Act") in 1972. Section 308(a) of the Clean Water Act, 33 U.S.C. § 1318(a)(B), is copied virtually word-for-word from section 114(a)(2) of the Clean Air Act.[8] The Senate report

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[8] Section 308(a)(B) of the Clean Water Act, 33 U.S.C. § 1318(a)(B), reads as follows:

> (B) the Administrator or his authorized representative, upon presentation of his credentials—
>
> (i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and
>
> (ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample

on S. 2770, which was the basis of the final enactment, says the following about section 308:

> It should also be noted that the authority to enter, as under the Clean Air Act, is reserved to the Administrator and his authorized representatives *which such representatives must be full time employees of the Environmental Protection Agency.* The authority to enter is not extended to contractors with the EPA in pursuit of research and development.

S. Rep. No. 92-414, 92d Cong., 2d Sess. (1971), *reprinted in* [1972] *U.S. Code Cong. & Ad. News* 3668, 3729 (emphasis added).

The district court, 511 F.Supp. at 747, and the Ninth Circuit, *Bunker Hill*, 658 F.2d at 1284, dismissed this statement because it was made after enactment of the Clean Air Act. We, on the other hand, believe it is critical.

We realize that ordinarily, "[a] mere statement in a conference report . . . as to what the Committee believes an earlier statute meant" is entitled to little weight. *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980). However, this is an exceptional case. The understanding of a later Congress, while not binding, is entitled to deference. *Moore* v. *Harris, supra.* Where a problem of interpretation was apparently not foreseen by Congress, it is appropriate to consult and be guided by those areas covering the same subject where the

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any effluents which the owner or operator of such source is required to sample under such clause.

As stated in the Senate Report about Section 308, the authority to enter is not extended to contractors with the EPA in pursuit of research and development.

expression of legislative intent is clear. *DeAvilia* v. *Civiletti*, 643 F.2d 471 (7th Cir. 1981). The Clean Air and Clean Water Acts are in *pari materia* with one another. *General Motors Acceptance Corp.* v. *Whisnant*, 387 F.2d 774 (5th Cir. 1968); *Hallenbeck* v. *Penn Mutual Life Insurance Co.*, 323 F.2d 566 (4th Cir. 1963); *see Atlantic Refining Co.* v. *Federal Trade Commission*, 344 F.2d 599 (6th Cir. 1965). This is especially true when the Clean Water Act's section 308(a) was explicitly modeled after section 114(a)(2) of the Clean Air Act. *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 755-56 (1979); *United States* v. *Freeling*, 31 F.R.D. 540 (S.D.N.Y. 1962)

Moreover, the Senate report on the Clean Water Amendments was authored a scant ten months after passage of the Clean Air Act, by the same committee (Public Works) which considered the Clean Air Act. Thus, in the circumstances of this case, it is proper to give the quoted statement great weight, even though a similar statement was years later might be of little value.[9]

It should also be noted that section 308(b) of the Clean Water Act, 33 U.S.C. § 1318(b), tracks the language of section 114(c) of the Clean Air Act in permitting the Administrator to reveal confidential

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[9] The district court pointed to the last sentence in the quoted statement regarding contractors and found that, since section 103(b)(4) of the Clean Air Act, 42 U.S.C. § 7403(b)(4), permits the use of contractors for research and development, there was a "lack of congruence" between the Clean Air and Clean Water Acts, making the relevance of the Clean Water Act legislative history questionable. 511 F. Supp. at 747. This overlooks the fact that section 104(b)(4) of the Clean Water Act, 33 U.S.C. § 1254(b)(4), also permits the EPA to contract with private organizations for research and development.

information to "other officers, employees, or authorized representatives of the United States." [10] Since it is manifest that the word "representative" was given two different meanings in section 308 of the Clean Water Act, this reinforces our interpretation, *supra*, giving that word two meanings in section 114 of the Clean Air Act.

As we have seen, section 114 of the Clean Air Act and section 308 of the Clean Water Act are in *pari materia*, and should be interpreted the same way. We have also seen that courts must consider the consequences which would result from a particular construction. *Sheftic v. Boles*, *supra*. As the Tenth Circuit recognized in *Stauffer I*, 647 F.2d at 1079, if the EPA's interpretation of section 114, permitting private contractors to be "authorized representatives" is followed, it would lead to the anomalous result that the EPA could use private contractors to make inspections under the Clean Air Act, but not to make inspections under the Clean Water Act, even though the wording of the statutes is identical. Such a result makes no sense, and we decline to introduce such a blatant contradiction into the law.

It is instructive to compare the statutes which we have been discussing with the Solid Waste Disposal Act Amendments of 1980, P.L. 96-482. Section 3007 of the Solid Waste Disposal Act, 42 U.S.C. § 6927, formerly permitted entry and inspection of facilities which generate or handle hazardous wastes by "any officer or employee of the Environmental Protection Agency, duly designated by the Administrator, or . . . any duly designated officer [or] employee of a State having an authorized hazardous waste program. . . ." The 1980 amendments inserted "repre-

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[10] *See* footnote 6, *supra*.

sentative" after "employee," so that inspection authority is now given to "any officer, employee or representative" of EPA or the states. The legislative history of the 1980 Solid Waste Disposal Act Amendments expressly shows that the word "representative" was added for the specific purpose of covering private contractors: "the amendment clarifies that the Administrator may authorize EPA contractors to obtain samples, perform inspections, and examine records at facilities which handle hazardous wastes." S. Rep. No. 96-172, 96th Cong., 2d Sess. 3 (1979), *reprinted in* [1980] *U.S. Code Cong. & Ad. News* 5019, 5021.

> The Senate bill includes amendments to section 3007(a) to assure that the inspection authority for purposes of developing regulations or enforcement provisions extends to . . . employees and representatives of the Environmental Protection Agency.

H.R. Conf. Rep. No. 96-1444, 96th Cong., 2d Sess. 35 (1980), *reprinted in id.*, 5028, 5034.

The Ninth Circuit compared "authorized representative" in section 114 of the Clean Air Act with "officers or employees" in section 206 of the Act and concluded that, "where Congress meant to limit inspections to officers and employees it did so." *Bunker Hill*, 658 F.2d at 1283. The district court below reached the same conclusion. 511 F. Supp. at 746. Without faulting the logic of that position, we think the shoe can just as logically go on the other foot: section 6927 shows that, when Congress meant to *expand* inspection authority *beyond EPA* officers and employees it knew how to do so and took specific steps to make that clear.

We have criticized the district court's and Ninth Circuit's position, construing "representative" to include contractors, for leading to an inconsistency between the Clean Air and Clean Water Acts. Our position restricting "representative" to officers and employees of the EPA leads to an inconsistency between the Clean Air and Clean Water Acts on one hand the Solid Waste Disposal Act on the other, i.e., under our view the EPA will be able to use private contractors to conduct inspections under the Solid Waste Disposal Act but not under the Clean Air and Clean Water Acts. This inconsistency is also regrettable, but it at least has the virtue of being founded upon express differences in language and explicit statements of Congressional intent, instead of treating identically-worded statutes differently.

EPA argues that Congress has ratified its use of contractors by its failure to amend section 114(a) in 1977 when it enacted that year's Clean Air Amendments (which added section 114(d)), and by approving EPA budget requests which included amounts budgeted for use of contractors in Clean Air enforcement activities. Stauffer counters that there has been no Congressional ratification, only inaction or silence. We agree with the district court that the evidence either way on ratification is inconclusive.

Section 114(d) was added by the Clean Air Amendments of 1977, P. L. 95-95. EPA argues that, while Congress was thus amending section 114, it could have amended section 114(a)(2) if it was dissatisfied with the "authorized representative" language, but did not do so. We agree with the district court's conclusion, 511 F. Supp. at 749, that it does not appear that Congress considered the question of who is an authorized representative at that time. Neither

the legislative history of the House bill, which was enacted, nor the conference report discusses the question of authorized representative. *See* H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 27 (1977), *reprinted in* [1977] *U.S. Code Cong. & Ad. News* 1077, 1105 and H.R. Conf. Rep. No. 95-564, 95th Cong., 1st Sess. 135 (1977), *reprinted in id.*, 1502, 1516. "Legislative silence is a poor beacon to follow in discerning the proper statutory route." *Zuber* v. *Allen*, 396 U.S. 168, 185 (1969). However, as we have discussed above, section 114(d) uses the word "representative" in a sense which can only be synonymous with "officer or employee."

The EPA also argues that Congress has ratified its use of contractors as "authorized representatives" by its approval of agency appropriations requests which included amounts for use of contractors in Clean Air enforcement activities. For instance, EPA quotes a 1977 budget request to "obtain contractor assistance to solve non-attainment problems posed by Class A and Class B emitters."

The Supreme Court has noted that Congressional ratifications may be effected through appropriations acts. However, "the appropriation must plainly show a purpose to bestow the precise authority which is claimed." *Ex Parte Endo*, 323 U.S. 283, 303 n.24 (1944). In our opinion, it is doubtful that an obscure budget item counched in the kind of murky language quoted above is sufficient to plainly show a Congressional intent to ratify the EPA's interpretation of "authorized representative," especially in the fact of an explicit expression of intent to the contrary in the legislative history of the Clean Water Act, discussed *supra*. Also, the appropriation could be construed to provide for the payment of contractors only

where the statute expressly authorized their use such as for research and development and other specific purposes.

By differing with the district court, we do not denigrate the court's able opinion, for cogent arguments can be raised on both sides. The EPA filed affidavits in the court below stating that forbidding it to use contractors in Clean Air oversight inspections would hamper or even cripple the program, and it might also be argued that, in this era of government cutbacks, it is preferable to permit the EPA to use contractors rather than hire more full time employees. On the other hand, the execution of search warrants is a traditionally governmental function, and Stauffer and other owners of commercial property have legitimate concerns regarding the safety of trade secrets when employees of contractors, who may have other clients and conflicting interests, are permitted to conduct inspections under ex parte search warrants issued where the property owner is afforded no opportunity to be heard.

For the reasons outlined above, we hold that the words "authorized representative" in section 114(a)(2) of the Clean Air Act, 42 U.S.C. § 7414(a)(2), mean officers or employees of the EPA, and cannot include employees of private contractors, and that the district court erred in its holding to the contrary and in failing to quash the search warrant which improperly permitted access to Stauffer's facilities by employees of PEDCo acting as representatives of the EPA.

The judgment of the district court is reversed and the cause is remanded with instructions to order judgment in favor of Stauffer.

JONES, Circuit Judge, concurring. Although I concur with Judge Weick's well-reasoned opinion, I write separately to articulate my views concerning the application of collateral estoppel to the present case.[1] In my opinion, the application of the doctrine precludes this Court from addressing the merits of the issue presented. Accordingly, I limit my concurrence to section II of Judge Weick's opinion.

Application of the doctrine of collateral estoppel involves a consideration of three factors. Under this doctrine, a judgment rendered in a prior law suit between the parties precludes the relitigation of those issues previously raised, considered and determined when a subsequent suit, based upon a different claim or demand, is brought. *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-98 (1948). Thus, a court must initially determine whether the issues presented in the second action are identical to those resolved in the previous action. *Montana* v. *United States*, 440 U.S. 147, 155 (1979). In the instant case, it is undisputed that the issue resolved by the litigation in *Stauffer I* is identical to the question raised in this appeal.

However, the finding of an identity of issues in the first and second action does not end the inquiry. This Court has steadfastly refused to apply the doctrine of collateral estoppel mechanically or rigidly. Rather, this rule is "qualified or rejected when [its] application would contravene an overriding public policy or result in manifest injustice." *Tipler* v. *E. I. duPont deNemours & Co.*, 443 F.2d 125, 128 (6th Cir. 1971). *See also Shimman* v. *Frank*, 625 F.2d 80, 89 (6th Cir.

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[1] **As noted by Judge Siler in his concurring opinion, res judicata is inapposite to the present case since this litigation involves a different set of operative facts and hence a different cause of action than *Stauffer I*.**

1980); *United States* v. *LaFatch*, 565 F.2d 81, 83 (6th Cir. 1977), *cert. denied sub nom.*, *LaFatch* v. *MM Corp.*, 435 U.S. 971 (1978); *Bronson* v. *Board of Education*, 525 F.2d 344, 349 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976). The Supreme Court, in *Montana* v. *United States*, *supra*, identified the following two questions, both of which must be resolved favorably to the party asserting collateral estoppel before the doctrine can be applied: (1) "whether controlling facts or legal principles have changed significantly" since the judgment in the prior suit; and (2) "whether other special circumstances warrant an exception to the normal rules of preclusion." 440 U.S. at 155.

The first inquiry seeks to prevent the application of collateral estoppel in situations where the legal principles underlying the initial judgment have been altered, thus weakening its conclusive nature. *See Commissioner* v. *Sunnen*, 333 U.S. at 599-602. An examination of the record in the present case reveals that there has been no such change in the legal principles underlying the decision in *Stauffer I*. Therefore, the only remaining issue is whether an exception to the application of the doctrine should be made on equitable grounds.

In *Montana* v. *United States*, the Supreme Court identified one set of circumstances which counsels against the application of the doctrine. "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness or fairness of the procedures in prior litigation." 440 U.S. at 164 n.11. Moreover, this Court has identified a number of other circumstances which have been found to justify an exception to the application of the rule. *See, e.g.*, *Hawkins* v. *Holiday Inns, Inc.*, —— F.2d ——, slip

opinion, No. 80-1233 (6th Cir. March 13, 1981) (a broader range of proofs is required in the second action than in the prior action); *Shimman* v. *Frank*, *supra*, (lesser burden of proof required in the subsequent action than imposed in the first); *United States* v. *LaFatch*, *supra* (overriding public policy against bribery of public officials); *Tipler* v. *E. I. duPont deNemours & Co.*, *supra* (differences in the purposes and requirements of the statutory provisions under which the prior and subsequent actions have been prosecuted). *See generally Westwood Chemical Co.* v. *Kulick*, 656 F.2d 1224, 1228-32 (6th Cir. 1981). EPA has not asserted, nor does the record reflect, that any of the circumstances identified by the preceding cases are present.

However, I note that, in his concurring opinion, Judge Siler identifies two apparent sources of injustice which would spring from the invocation of the rule. Initially, he states that "injustice would result if EPA were precluded from entering in Stauffer's plant in Tennessee, but were using private contractors in entering competitors' plant in the same area." I am not persuaded. In my opinion, the injustice, if any, is suffered by Stauffer whose plants and trade secrets in one area will be protected, while in another, private individuals will be able to enter and inspect its facilities. To prevent such an anamoly, collateral estoppel should be applied. *See Continental Can Co.* v. *Marshall*, 603 F.2d 590 (7th Cir. 1979).[2]

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[2] *Continential Can* involved a somewhat analogous situation. There, a can manufacturer sued to enjoin the Department of Labor from prosecuting pending citations issued as a result of alleged violations of OSHA noise regulations. Previously, a proceeding involving several of the manufacturer's plants in California resulted in a finding that the company had

Further, given the concurrence of two panel members as to the issue of employing private contractors in these inspections, the injustice identified will remain since the EPA will *technically* retain the power to use private contractors elsewhere in the circuit. But even EPA's power to use these individuals in its inspections is illusory since the *stare decisis* impact of the Court's holding today, if it becomes final, may be expected to eliminate the practice in this jurisdiction. *See Allegheny General Hospital* v. *NLRB*, 608 F.2d 965, 970 (3d Cir. 1979). In short, application of collateral estoppel is only minimally related to the harm identified.

Judge Siler also remarks that application of collateral estoppel is improper where several cases, involving the same legal issue, are being litigated in different areas and result in inconsistent decisions. However, I adhere to the position articulated in *Western Oil and Gas* v. *E.P.A.*, 633 F.2d 803, 809 (9th Cir. 1980), where the court concluded, " we think the fact of inconsistent decisions is a relevant, but not always dispositive, factor to be considered in the exercise of discretion [in refusing to apply the doctrine]." In the present case, this factor weighs in favor of applying the doctrine. The Ninth Circuit in articulating this rule relied on dictum appearing in several Supreme Court cases which apparently approve the practice of agency relitigation. *See E.I.*

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fulfilled its obligation by employing the most economically feasible engineering controls. After noting that the manufacturer's other eighty plants, located nationwide, were structurally similar and had the identical noise "problem" as that involved in the prior proceeding, the court held that fairness required an application of collateral estoppel in order to dismiss the pending citations concerning these other plants.

duPont deNemours & Co. v. *Train*, 430 U.S. 112, 135 n.26 (1977); *Union Electric Co.* v. *E.P.A.*, 427 U.S. 246, 254-55 (1976); *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 72-75 (1975). However, an examination of these cases reveals that they involved circumstances not present here. In each, the agency's relitigation of an issue in several courts of appeal was prosecuted by and against *different* parties as opposed to the *same* party as in the case at bar. Although not dispositive, this factor weighs on the side of the party urging the application of collateral estoppel because its application will serve the following purpose recently enunciated by the Supreme Court:

> To preclude parties from contesting matters that they have had a full and fair opportunity to ligitage protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Montana v. *United States*, 440 U.S. at 153-54 (footnote omitted). While I do not favor precluding a federal agency's ability to test its policy decisions in more than a single circuit, in circumstances where the same defendant is sued *in seriatim* without the agency attempting to exhaust its appeals on the previous judgment, the equities favor application of collateral estoppel and not its abdication. Thus, in my opinion, application of the rule is proper.

SILER, District Judge, concurring. I concur with the majority opinion on the merits but disagree with it on procedural grounds, that is, I believe the doctrines of collateral estoppel and res judicata should not be applied here.

Where the history of the cases shows that in *Stauffer I*, as designated in the majority opinion, the Wyoming district court opinion in favor of the EPA was rendered on June 23, 1980, there was legal authority for the action of the EPA at the time it obtained a warrant and went to inspect the Tennessee plant on August 7, 1980. Then, the district court in this case held its hearing on August 29, 1980, while the district court opinion from Wyoming was the only available court decision on the subject.

Next, the district court in Tennessee below rendered its decision on April 17, 1981, not precluded at all from deciding the case by res judicata or collateral estoppel. Then, on May 8, 1981, the opinion from Wyoming was affirmed in *Stauffer Chemical Co.* v. *E.P.A.*, 647 F.2d 1075 (10th Cir. 1981). Apparently no further appeal was attempted in that case, although a rehearing was denied on June 16, 1981. Finally, before the case at bar was argued, the decision in *Bunker Hill Co. Lead & Zinc Smelter* v. *United States E.P.A.*, 658 F.2d 1280 (9th Cir. 1981), was decided on October 13, 1981.

Res judicata is not applicable here, as a cause of action different from that in *Stauffer I* was involved, but collateral estoppel would be applicable. *See Commissioner* v. *Sunnen*, 333 U.S. 591 (1948); *Hart* v. *Federal Reserve Bank of Atlanta*, 270 F. Supp. 296 (M.D. Tenn. 1966) (Miller, J.), *aff'd*, 379 F.2d 961 (6th Cir. 1967), *cert. denied*, 390 U.S. 924 (1968);

see generally Cream Top Creamery v. *Dean Milk Co.*, 383 F.2d 358 (6th Cir. 1967).

However, as stated in *Western Oil & Gas* v. *United States E.P.A.*, 633 F.2d 803, 808 (9th Cir. 1980), federal appellate courts "traditionally have permitted federal agencies to relitigate substantially identical *legal* issues raised by different transactions or events, after adverse decisions elsewhere." That court went on to say at 809:

> Collateral estoppel is not to be applied mechanically. In proper circumstances, it can prevent the waste of judicial resources and shield litigants from duplicative and often vexatious law suits. As the Supreme Court has recently recognized, however, countervailing policies may justify a refusal to apply principles of estoppel.

This doctrine was followed in *Castorr* v. *Brundage*, —— F.2d —— (No. 81-1638, 6th Cir. March 23, 1982), where the Court stated:

> We do not hold that the application of the principles of res judicata and collateral estoppel is mandatory in every case. They are an expression of the policy of federal courts preferring finality, *i.e.*, that litigation at some time must become final. In the face of more important federal policies, however, the preference for finality might be outweighed by more compelling considerations.

Id. at —— (slip opinion at 9). *Accord, Restatement of Judgment* § 70 (1942) (collateral estoppel not to be invoked if injustice would result).

Here, injustice would result if EPA were precluded from entering with private contractors at Stauffer's

plant in Tennessee, but were using private contractors in entering competitor's plants in the same area. Likewise, where several different cases involving the same issues are being litigated simultaneously in separate circuits, collateral estoppel should not be invoked. Thus, collateral estoppel, although legally applicable, is not appropriate here.

Nevertheless, I concur with the majority opinion on the merits of the issue. Where the federal government has embarked upon a policy so radically divergent from its standard policy, that is, having only government officers or employees executing search warrants and inspecting plants, it seems that authority for such conduct should be clear from the Act itself or from legislative history. As the authority to allow the private contractors to be used under the circumstances of this case is not at all clear, EPA should not be allowed to use these private contractors for such inspections until Congress amends its legislation. *Cf. Bread Political Action Committee* v. *Federal Election Commission*, —— U.S. ——, 50 U.S.L.W. 4921 (1982).

In concurring with the majority opinion to reverse the district court I am not suggesting that the lower court "missed the signs on a well marked trial," *Getty* v. *Reed*, 547 F.2d 971, 975 (6th Cir. 1977), for when it rendered its decision below, it had no benefit of an appellate court decision directly on point.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 81-5311

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

STAUFFER CHEMICAL COMPANY, DEFENDANT-APPELLANT

[Filed Oct. 15, 1982]

Before WEICK,* Senior Circuit Judge, JONES, Circuit Judge and SILER,** U.S. District Judge.

ORDER

No active judge of this court having requested that a vote be taken on the suggestion of the appellee that its petition for rehearing be heard en banc, said petition for rehearing was therefore referred to the panel for consideration and determination.

Upon consideration of the petition for rehearing, we are of the view that the issues in this appeal were adequately dealt with in our slip opinion and that

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* Judge Weick became a Senior Circuit Judge at the close of business on December 31, 1981.

** Honorable Eugene E. Siler, Jr., Judge, United States District Court for the Eastern and Western Districts of Kentucky, sitting by designation.

the petition lacks merit. The appellee has not demonstrated that EPA in conducting a pollution inspection and search of private commercial property of Stauffer Chemical Company needs the services not only of its own employees as well as the employees of the State of Tennessee, but in addition thereto requires the services of a private contractor who is a competitor of Stauffer with conflicting interests who may have an axe to grind and may be interested in obtaining trade secrets of Stauffer.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
M.D. TENNESSEE
COLUMBIA DIVISION

No. 80-1029

UNITED STATES OF AMERICA

v.

STAUFFER CHEMICAL COMPANY

Decided and Filed April 17, 1981

MEMORANDUM

WISEMAN, District Judge.

This case is before the Court on motion of plaintiff, United States for the Environmental Protection Agency, for contempt and motion of defendant, Stauffer Chemical Company, to quash an administrative search warrant. The central issue in the case is whether the words "authorized representative" in section 114(a)(2) of the Clean Air Act include private, independent contractors or are limited to employees of the Environmental Protection Agency. The Court holds that private contractors may be considered authorized representatives under the Act.

Facts

On August 7, 1980, the United States for the Environmental Protection Agency [hereinafter EPA] obtained and attempted to execute an administrative search warrant to inspect an elemental phosphorus producing plant of Stauffer Chemical Company [here-

inafter Stauffer] in Mt. Pleasant, Tennessee. EPA sought the warrant [1] pursuant to its authority under section 114 of the Clean Air Act, 42 U.S.C. § 7414.

EPA had contracted with PEDCo Environmental, Inc., to conduct overview inspections. EPA, PEDCo, and PEDCo employees have entered into agreements that are intended to hold the employees to strict confidentiality. See discussion of confidentiality measures *infra*. When representatives of EPA, the Tennessee Department of Public Health, and PEDCo arrived at the Stauffer plant, the PEDCo employee was denied entry, unless he executed an elaborate nondisclosure agreement with Stauffer. Stauffer sought the nondisclosure agreement to protect it from disclosure of trade secrets or other proprietary information. The PEDCo employee refused to execute the nondisclosure agreement because it contained provisions inconsistent with EPA's enforcement policies. One of the most obnoxious provisions would have required the EPA contractor to give the plant two weeks' notice of the date of an inspection.

On August 8, 1980, EPA brought this civil contempt proceeding against Stauffer because of the refusal to allow the PEDCo employee into the plant. That same day Stauffer moved to quash the administrative search warrant issued by the Magistrate.

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[1] The warrant provided, in part, that:

> EPA, through its duly authorized full-time employees, and accompanying, authorized representatives under contract with EPA, the United States Marshal or any other federal officer, are hereby entitled to and shall be authorized and permitted to have entry upon the [Stauffer Chemical plant] premises during normal operating hours for the purpose of conducting an inspection, sampling, and monitoring pursuant to Section 114 of the Clean Air Act.

These matters were consolidated for hearing on August 29, 1980. Stauffer argues that section 114 of the Clean Air Act does not authorize private contractors to carry out EPA plant inspections, and that EPA is not authorized to use an ex parte proceeding to obtain a warrant to inspect plant premises.

Discussion

At the outset the Court notes that counsel for both sides have submitted excellent briefs in support of their respective theories. Although well-researched and presented memoranda always aid the Court in its decision-making process, little could make resolution of the section 114 question easier. District courts in other circuits have split on this issue.[2] Writing on a clean slate in this Circuit, this Court holds that "authorized representative" may include private contractors.

Authorized Representative

Section 114(a)(2) of the Clean Air Act provides that:

> [*T*]*he Administrator or his authorized representative*, upon presentation of his credentials—
>
> (A) shall have a right of entry to, upon, or through any premises of such person or in which any records required to be main-

[2] *Bunker Hill Co.* v. *EPA*, No. 80-2087 (D.Idaho Oct. 1, 1980) (authorized representative includes private contractors); *In re Alcoa*, No. M-30-13 (M.D.N.C. Aug. 5, 1980) (decision of Magistrate that authorized representative includes private contractors affirmed); *In re Stauffer Chemical Co.*, 14 Envir. Rep. (BNA) 1737 (D. Wyo. June 24, 1980) (authorized representative does not include private contractors).

> tained under paragraph (1) of this section are located, and
>
> (B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which such person is required to sample under paragraph (1).

42 U.S.C. § 7414(a)(2) (emphasis added).

Stauffer argues that only officers and employees of EPA were contemplated as authorized representatives. For support, Stauffer relies on an *in pari materia* construction of section 114 and sections 206 and 208, and the legislative history of the 1970 Clean Air Act Amendments and the 1972 Clean Water Act Amendments. More generally, Stauffer urges that Congress did not intend for private parties to participate in plant searches because law enforcement searches are traditionally carried out by public officials.

Under sections 206(c) and 208(a), 42 U.S.C. §§ 7525(c), 7542(a), only officers or employees duly designated by the Administrator may participate in motor vehicle plant inspections. Stauffer says that this limitation should be read into section 114 because it clearly evinces Congress' intent regarding who can participate in plant inspections. EPA also regards the difference between sections 114 and 206 and 208 as significant, but suggests that the difference was intended to reflect a measured congressional choice. The Court finds EPA's construction more persuasive.

Section 114 contains two references to "authorized representatives." In addition to subsection (a)(2),

subsection (c) allows confidential information obtained under subsection (a) to be disclosed to "other *officers, employees, or authorized representatives* of the United States concerned with carrying out this Act." 42 U.S.C. § 7414(c) (emphasis added). That Congress intended authorized representatives to be distinguishable from officers and employees is obvious from the disjunctive listing in this section. If authorized representatives were limited to officers or employees, the inclusion of authorized representatives in this subsection would have been mere surplusage. The Court will not conclude that Congress intended to be redundant. Moreover, section 114 concerns inspections generally and specifically exempts 42 U.S.C. § 7521 *et seq.*, the motor vehicle plant inspection provisions, from its scope.

Stauffer also argues that clear evidence of congressional intent comes from the legislative history of the Clean Water Act Amendments of 1972, which were modeled after the Clean Air Act Amendments of 1970. In discussing the inspection and entry provisions of the Clean Water Act, section 308, 33 U.S.C. § 1318, two years after the Clean Air Act Amendments had been passed, the Senate Public Works Committee Report limited authorized representatives to full-time EPA employees.

> It should be noted that the authority to enter, *as under the Clean Air Act*, is reserved to the Administrator and his authorized representatives *which such representatives must be full time employees of the* [*EPA*]. The authority to enter is not extended to contractors with the EPA in pursuit of research and development.

Sen. Rep. No. 92-414, 92d Cong., 2d Sess. 63 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News

3668, 3729 (emphasis added). Clean Water Act section 308(a)(B) is virtually identical in section 114 of the Clean Air Act.[3]

This portion of the legislative history of section 308 of the Clean Water Act does give the Court pause. The two statutes concern environmental matters; the Clean Water Act was even modeled after the Clean Air Act. The temporal difference in when the words authorized representative were used is not that great, a mere two years. Yet it is difficult to attribute a construction to a statute by virtue of statements made after the statute was enacted. The courts must be concerned with what the legislature that enacted the statute in question meant when the statute was enacted, not what was meant when other legislation was considered years later.

The last sentence of the significant paragraph of the Clean Water Act legislative history states that contractors will not have authority to enter "with the EPA in pursuit of research and development." Section 103 of the Clean Air Act, however, clearly provides for the use of "private agencies, institutions, and organizations, and individuals," 42 U.S.C. § 7403

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[3] [T]he Administrator or his authorized representative, upon presentation of his credentials—

(i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and

(ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause.

33 U.S.C. § 1318(a)(B).

(b)(4), to "conduct investigations and research and make surveys concerning any specific problem of air pollution," *id.* § 7403(a)(3). This lack of congruence between the legislative history of the Clean Water Act and the provisions of the Clean Air Act makes the relevance of the legislative history of the Clean Water Act questionable. Postenactment statements should be used only sparingly as determinative of legislative intent because of the basic unreliability of statements made with nothing at stake regarding the earlier legislation. A better view of the legislative intent as expressed in legislative history is available when the relevant sections of the Clean Air Act Amendments of 1970 are traced through the maze of legislative committees to enactment.

On June 3, 1970, the Committee on Interstate and Foreign Commerce of the House of Representatives reported out its version of the amendments to the Clean Air Act, which limited entries to "officers or employees duly designated by the Secretary."[4] H.R. 17255, 91st Cong., 2d Sess., *reprinted in* Legislative History of the Clean Air Amendments of 1970, at 918, 923 (1974) [hereinafter cited as Legislative History of 1970]. The Senate version of the Clean Air Amendments was reported out of the Committee on Public Works on September 17, 1970, and it provided for entry by "the Secretary or his authorized representative." S. 4358, 91st Cong., 2d Sess., *reprinted in* Legislative History of 1970 at 570. The Conference Committee obviously resolved the conflict in favor of the Senate version because the enacted statute uses the same terminology. The plain meaning of authorized representative is broader than duly

[4] At that time the Secretary of Health, Education, and Welfare was in charge of air pollution matters.

designated officers or employees. That the Conference Committee and the Congress as a whole chose to enact the broader terms into law is significant.

The final and Senate versions differed from the House version in another significant respect. The requirement of written notice of inspections, contained in the House draft, was omitted in the Senate and final versions. See 42 U.S.C. § 7414(a)(2); Legislative History of 1970 at 151, 570, 918, 923. The philosophy of the Senate and House versions appears to have differed. The Senate version granted the agency more power and authority to enforce the provisions: the requirement of notice of inspections was omitted from the Senate version. Because subsection (c) of section 114 includes authorized representatives in the disjunctive with officers and employees, and because the Conference Committee obviously chose the Senate version over the House version the Court concludes that authorized representative means more than simply officers or employees of the agency.

The power to participate in administrative searches, Stauffer argues, should not be extended to private contractors. Because historically search powers have been entrusted only to public officials, Stauffer contends that the Court should not read Congress' intent as extending the power to private contractors without more specific statutory language.

The relevance of the common law and other historical antecedents to plant inspection searches is minimal because of the different interests at stake. The Clean Air Act embodies a system that comprehensively regulates air pollution. *See* W. Rodgers, Handbook on Environmental Law 208-353 (1977). Although some court actions were available to attack pollution at common law, such as nuisance abatement, modern pollution legislation represents a dra-

matic change toward governmental regulation, supervision, and enforcement. Air pollution and water pollution control guidelines cover matters so complex, such as ambient air quality standards and effluent limitations, that simple exercise by the state of its police power was determined to be ineffective. Federal enforcement was recognized as a prerequisite to meaningful pollution control. Congress expressly recognized that private agencies would be helpful in the investigation and research aspect of air pollution control. 42 U.S.C. § 7403(a)(3), (b)(4). Congress considered private contractors proper recipients of confidential information when duly authorized by the Administrator, *id.* § 7414(c). Thus, it is not unreasonable to conclude that Congress entrusted private parties with the power to enter and conduct onsite monitoring inspections.

Stauffer fears exposure of its proprietary processes by the private contractor who was hired by EPA. Although Stauffer concedes that it cannot prohibit state or federal government employees from entering areas that contain proprietary processes, it argues that even though they are authorized by the Administrator, private contractors stand in different shoes than government employees. Because private contractors are not government employees, they are not subject to criminal sanctions of the Trade Secrets Act, 18 U.S.C. § 1905, which prohibit unauthorized disclosure of trade secrets. The private contractor hired by EPA in this case causes Stauffer some concern because the company is part of the PEDCo group, which in some undetermined capacity may compete with Stauffer.

Clearly Congress envisioned the receipt of confidential proprietary information by persons other than

officers or employees of EPA. *See* 42 U.S.C. § 7414 (c). This Court has held that private parties authorized by the Administrator may enter under section 114. Thus, the issue becomes whether they should be prohibited from entering because of inadequate protection against disclosure.

This Court holds that EPA's contract with the PEDCo employees in this case [5] and EPA regulations, 40 C.F.R. § 2.301(h), are sufficient protection against disclosure. The contract imposes the duty of confidentiality and the penalty of dismissal and damages for breach of that duty. Under the regulations, the private contractor agrees that an "affected business [with] an interest in the information" is entitled to

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[5] The substantive portions of the confidentiality agreements between PEDCo employees and PEDCo provide as follows:

> PEI [PEDCo] possesses certain confidential information, so identified, relating to industrial processes and facilities (referred to below as "confidential information") which it has obtained in the past from its clients. PEI continues to obtain confidential information both directly from its clients and from third parties as a result of work done for its clients.
>
> Employee may obtain confidential information from time to time as a result of visual inspection of records and facilities of PEI's clients or from third parties as a result of work done for PEI's clients.
>
> NOW THEREFORE, in consideration of monies paid to employee by way of salary and other employee benefits, Employee agrees that, except as directed in the course of his employment, he will not disclose any confidential information to anyone, directly or indirectly. Employee further agrees to observe the general security procedures that PEI adopts and understands that any willful violation of the company's general security procedures will result in immediate dismissal and liability for any damages arising therefrom.

third-party beneficiary status under any confidentiality agreement and may enforce the agreement against any breaching employee. *Id.* § 2.301(h)(2)(ii)(c)(1980). If EPA were hiring direct competitors of the affected business to conduct the inspection monitoring, a court might be forced by equitable considerations to put a halt to the practice. It does not appear in this case, however, that PEDCo Environmental, Inc., was in direct competition with Stauffer. If an unauthorized use or disclosure is made, Stauffer can seek injunctive and damage relief against PEDCo and the employee. Likewise, in this Court's opinion an affected business should be able to hold EPA responsible if it can show that EPA could have reasonably foreseen a likelihood of unauthorized use or disclosure.

Stauffer suggests that the Agency has admitted by its own regulations and internal memoranda that authorized representatives means employees or officers. At the very least, Stauffer contends, EPA has not recognized that anyone other than EPA officers and employees can conduct *entries*. On the other hand, EPA says that Congress has ratified the Agency's consistent construction that allows for entry by private contractors by not changing section 114 when it was reviewed in 1977. For purposes of this decision, neither argument is conclusive.

Stauffer overstates its case when it cites 41 Fed. Reg. 36,923 (Sept. 1, 1976) (response to Comment 69) in support of its argument. The Administrator clearly rejected the Comment's statement that only officers and employees may be considered authorized representatives. Stauffer attempts to point out an agency-usage distinction between receiving confidential information and entry. The Agency has used pri-

vate contractors for inspection and entry since 1973, however, and any clearer evidence that the Agency construed authorized representative to include private contractors would be hard to find. Yet, this Court does not wholly accept the ratification argument because it does not appear that the issue of what authorized representative meant was reconsidered by Congress in 1977.

Ex Parte Warrant Procedure

Stauffer raises another issue in support of its motion to quash, that the use of ex parte warrants exceeds EPA's statutory authority. This argument is without merit. As noted earlier, Congress rejected the House version of the 1970 Clean Air Act Amendments, which would have required presentation of prior written notice in order to gain entry upon presentation of credentials. 42 U.S.C. § 7414(a)(2). *Compare* Legislative History of 1970 at 918, 923 *with id.* at 570. To accept Stauffer's argument on this issue would be to write into the statute the House requirement of prior written notice. This Court will not accomplish by judicial fiat what House members were not able to convince Congress to enact.

The use of ex parte warrants for administrative inspections was approved by the Supreme Court in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed2d 305 (1978). In this case, the ex parte warrant procedure strikes the correct balance between the public and private interests at stake: the affected business is protected from overly burdensome agency actions by having the warrant reviewed by an independent magistrate, and the public is protected by preserving EPA's enforcement power. If an affected business had the opportunity for an ad-

versary hearing before an inspection could occur, it could temporarily shift its plant into compliance with Clean Air standards, only to return to polluting after termination of the inspection. Such activity would undermine EPA's enforcement power. Congress did not intend to limit pollution only when notice of an agency inspection is received.

For all these reasons, Stauffer's motion to quash is denied. Because Stauffer legitimately believed that private contractors were not authorized representatives under the Clean Air Act, EPA's motion for contempt is denied. If Stauffer's subsequently refuses entry to its Mt. Pleasant plant to authorized representatives of the Administrator presenting proper credentials and a warrant, a contempt citation shall issue.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 81-5311

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

STAUFFER CHEMICAL COMPANY, DEFENDANT-APPELLANT

[Filed Jul. 7, 1982]

Before: WEICK, Senior Circuit Judge, JONES, Circuit Judge and SILER, District Judge.

JUDGMENT

APPEAL from the United States District Court for the Middle District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded with instructions to enter judgment in favor of Stauffer.

It is further ordered that Defendant-Appellant recover from Plaintiff-Appellee the costs on appeal as

itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN
Clerk

/s/ John P. Hehman
Clerk

A True Copy.

Attest:

/s/ Aucher Crockett
Deputy Clerk

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 81-5311

UNITED STATES OF AMERICA, APPELLEE

v.

STAUFFER CHEMICAL COMPANY, APPELLANT

On Appeal from the United States District Court
for the Middle District of Tennessee
Columbia Division

AFFIDAVIT IN SUPPORT OF RESPONSE IN OPPOSITION TO MOTION FOR STAY PENDING APPEAL

JAMES T. WILBURN, being duly sworn upon his oath, according to law, deposes and says:

1. I am Chief of the Compliance Branch, Enforcement Division, United States Environmental Protection Agency (EPA), Region IV. In this capacity, I supervise 22 employees with technical training who are responsible for ensuring that the approximately 4,600 major stationary sources of air pollution located in the eight state area under the auspices of EPA, Region IV, are in compliance with all applicable requirements of the Clean Air Act (the Act), 42 U.S.C. § 7401 *et seq.*

2. To ensure such compliance, these employees' routine job-related duties include numerous tasks, e.g., assessing the adequacy of enforcement activities of state and local air pollution control agencies, ob-

taining technical data about sources from state and local agency files or directly from sources, maintaining and updating EPA's Compliance Data System which provides a record of all Region IV sources' compliance status, conducting plant site inspections to determine compliance firsthand, and assisting in the preparation of enforcement actions where warranted, e.g., notices of violation and administrative orders under Section 113 of the Act, 42 U.S.C. § 7413, notices of noncompliance under Section 120 of the Act, 42 U.S.C. § 7420, and litigation reports for civil or criminal judicial actions.

3. Traditionally, the preceding duties have been performed entirely by EPA, Region IV, personnel, with the notable exception of conducting on-site plant inspections. For on-site inspections, Region IV has relied to a great extent upon the use of private contractors authorized under Section 114 of the Act, 42 U.S.C. § 7414, to conduct such inspections. Private contractors have been so authorized and used primarily for the following reasons:

a. Given the numerous enforcement duties required of the limited number of in-house personnel available, Region IV does not have the resources available to conduct inspections on a large scale; and

2. In many instances, private contractors may possess considerable expertise and experience regarding certain industrial categories which allow for more comprehensive on-site compliance determinations.

4. Accordingly, EPA, Region IV, has relied extensively on private contractors to conduct on-site inspections under the Region IV Overview Inspection Program and the use of such contractors has become

increasingly critical to the success of the program. Under this program, Region IV makes an independent assessment of the compliance status of stationary sources for which the applicable state air pollution control agency has made compliance determinations. Region IV conducts overview inspections of approximately ten percent (10%) of the major sources in each state per year to ensure that the state is accurately monitoring and reporting the compliance status of such sources.

5. While sources chosen for inspection under the overview program are selected based upon neutral administrative criteria, any significant evidence of violation of applicable air pollution regulations obtained during an overview inspection will be used for enforcement purposes.

6. With specific reference to the Stauffer Chemical Company's elemental phosphorus furnace plant in Mt. Pleasant, Tennessee, the purpose of the planned August 7, 1980, inspection of the plant under the terms of Warrant No. 80-3117M by Mr. John W. Hund of my staff and EPA's authorized representatives, Messrs. Ronald Hawks and Gary Saunders of PEDCo Environmental, Inc., was twofold:

a. To complete an overview inspection previously initiated by EPA; and

b. In conjunction with the overview inspection, to conduct sophisticated monitoring of the plant's pollution control equipment to determine if proper operation and maintenance practices were being employed.

7. For both of these purposes, the participation of EPA's contractor was, and is, critical. The PEDCo personnel have conducted prior inspections of elemental phosphorus furnace plants, including a Novem-

ber 28, 1979, inspection of a similar Stauffer plant located in Tarpon Springs, Florida, which Stauffer permitted the PEDCo employees to conduct without objection. As a result, the PEDCo employees have substantial expertise and experience in evaluating the compliance status of the complex processes at these plants. Additionally, Region IV relies upon PEDCo to conduct the sophisticated monitoring procedure referred to in paragraph 6, since the procedure was developed by PEDCo and utilizes equipment employed by PEDCo which Region IV does not have.

8. As part of its monitoring procedure, PEDCo samples various operating parameters of the pollution control devices to determine if the control equipment is operating within design specifications or capabilities. A pitot traverse is performed to determine the air flow through the control device. Motor (fan) current is measured using an amp meter, static pressure is monitored using magnebelic gauges, and temperature is measured with a thermometer. Once these parameters are obtained, a comparison can be made with the parameters obtained during previous official source performance tests at the plant to determine if the control device is operating on a daily basis in a manner consistent with its operation during the formal tests. The process weight (weight of material going through the process) is also monitored or verified and compared to the process weight during previous official source tests. These procedures require magnebelic gauges, pitot probes, amp meters, sample bottles and associated equipment which the EPA, Region IV, Enforcement Division, is not in possession of and does not use.

9. Since Stauffer's initial refusal on March 27, 1980, to allow EPA, Region IV, and its authorized representatives to conduct the necessary inspection

of the Mt. Pleasant plant, Region IV's statutory mandate to ensure compliance with the Clean Air Act has been significantly impaired, and further delays will create additional impairment of the enforcement program, including the following:

a. The integrity of EPA's Overview Inspection Program is being severely hampered by the delay in conducting a comprehensive compliance inspection of the Mt. Pleasant plant. Whereas numerous other sources in Region IV have been subject to overview inspections in which EPA's contractors have participated (70 thus far in Fiscal Year 1981 with 200 total anticipated) and have thereby been subjected to potential enforcement sanctions, Stauffer has long avoided such potential sanctions as a result of the time consumed in the present case. This development has placed Stauffer at an unfair advantage over sources which have been inspected and serves to encourage other sources to defy the Overview Inspection Program.

b. By obtaining a stay of the District Court Order in this case, Stauffer is permanently avoiding certain enforcement sanctions which the Mt. Pleasant plant might otherwise be presently subject to. Under Section 120 of the Act, 42 U.S.C. § 7420, and regulations issued thereunder on July 28, 1980, 45 Fed. Reg. 50086, EPA was required as of January 1, 1981, to issue a Notice of Noncompliance to any source violating specified requirements of the Act. Violating sources are required to pay penalties from the date notice is received until compliance is achieved.

For each day that a comprehensive inspection of the Mt. Pleasant plant is postponed, penalties for which Stauffer might otherwise be liable go permanently unassessed.

10. I know of no instance regionally or nationally, and to my knowledge Stauffer has been unable to cite an instance, in which claimed confidential information obtained either directly by EPA contractors or supplied by EPA to its contractors has been improperly disclosed by a contractor. This is so even though EPA has been increasingly using contractors for compliance inspections since as early as 1973.

11. With regard to Stauffer in particular, as noted in paragraph 7 above, Messrs. Hawks and Saunders of PEDCo conducted a thorough compliance inspection on behalf of EPA, Region IV, of Stauffer's elemental phosphorus furnace plant in Tarpon Springs, Florida, on November 28, 1979. The inspection was permitted by Stauffer without any reference to the need for a signed nondisclosure agreement between PEDCo and Stauffer and without any objection to the contractor's obtaining access to claimed confidential information.

12. Subsequently, there have been no allegations by Stauffer that the claimed confidential information obtained by PEDCo was in any way misused. Further, as Compliance Branch Chief, I would be informed of any improper disclosure of the materials obtained from the Tarpon Springs inspection, and I know of none.

13. The confidentiality procedures employed by PEDCo during and after the Tarpon Springs inspection are procedures which are, based upon my information and belief, routinely followed and would be followed in the compliance inspection of the Mt.

Pleasant plant if permitted in accordance with the District Court Order and Warrant.

14. PEDCo's internal confidentiality procedures and the confidentiality provisions of EPA's contract with PEDCo are set forth in the affidavit of Ronald W. Hawks dated August 7, 1980, submitted to the District Court in support of EPA's warrant application. Further, the August 7, 1980, affidavit of John W. Hund, setting forth in detail EPA's Overview Inspection Program, the chronology of EPA's efforts to inspect the Mt. Pleasant plant, and the critical need for EPA contractor's participation in such inspection was submitted to the District Court in support of EPA's warrant application. I have read each affidavit, am familiar with the contents of each, and know of no facts subsequent to their filing with the Court which would require modification of either affidavit in any material respect.

/s/ James T. Wilburn
JAMES T. WILBURN
Chief, Compliance Branch
Enforcement Division
United States Environmental
Protection Agency
Region IV

Subscribed and sworn to before me at Atlanta, Georgia, this 13th day of May, 1981.

/s/ Gloria R. Knight
GLORIA R. KNIGHT
Notary Public
State of Gergia
My Commission Expires July 7, 1981

AFFIDAVIT OF SERVICE

The undersigned avers that a copy of the foregoing affidavit was mailed to counsel for the appellant, Charles F. Lettow and Eric C. Jeffrey, 1250 Connecticut Avenue, N.W., Washington, D.C. 20036, and Robert J. Walker and Leigh W. Davidson, First American Center, Nashville, Tennessee 37238, by United States mail, postage prepaid this 13th day of May, 1981.

/s/ John H. Johnson, Jr.
JOHN H. JOHNSON, JR.

Subscribed to and sworn to before me at Atlanta, State of Georgia, this 13th day of May, 1981.

/s/ Gloria R. Knight
State of Georgia
Notary Public

My Commission Expires July 7, 1981.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 399186 1287